No.

Brief and Argument for Plaintiffs in Error

Filed Dec. 9, 1897.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

ELIZA COOPER ET AL., PLAINTIFFS IN ERROR,

v.

EDWARD S. NEWELL AND CLARENCE B. SMITH,
EXECUTORS, DEFENDANTS IN ERROR.

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

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Charles A. Crocker, Manufacturing Stationer, California.

Filed the ..... *day of* ..... 189...

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STATEMENT OF THE CASE.

It appears from the certificate, substantially—

That the suit was originally instituted in the United States Circuit Court for the Eastern District of Texas, *July 5, 1890,* by Stewart Newell *in the ordinary form of trespass to try title,* to recover the land in controversy, lying in Harris County in said district.

That upon Newell's death his executors, the present defendants in error, became plaintiffs, and by their fifth amended original petition, filed *February 17, 1896,*

in addition to the usual averments required in such actions, alleged that defendants, the present plaintiffs in error "*set up title*" to the land sued for under a judgment rendered by the District Court of Brazoria County, Texas, *May 20, 1850*, in a suit No. 1527, wherein Peter McGreal was plaintiff and said Stewart Newell was defendant.

That that judgment was null and void, and defendants could not claim "*title*" under it, for these reasons: that neither when that suit was filed nor when the judgment was rendered was Stewart Newell a resident of or within the county of Brazoria or the State of Texas, and that he had never resided in said county; that Newell resided in Galveston County, Texas, on January 2, 1848, but on that date left the State permanently, and ever after until his death, April 11, 1891, resided in other States, and was never in Texas; that Newell was never notified, by citation or otherwise, of the existence of the suit—never had knowledge of it nor was consciously a party to it, nor submitted himself to the court's jurisdiction, nor employed or authorized anyone to represent or appear for him in it, nor knew of its existence *until just prior to the institution of the present action;* that if any attorney appeared for him in the suit such appearance was without his authority, permission, knowledge or consent, and through collusion between such attorney and the plaintiff therein to injure and defraud Newell; that when the judgment was entered Newell had a meritorious defense to the suit—was owner in fee of the tract of land, here

and there involved, by deed made to him by Peter McGreal, August 9, 1848; and specially, that *J. A. Swett* had no authority or permission to appear in that case, and that his appearance therein was without the knowledge, consent or approval of Newell.

Attached to and made part of the petition was a certified copy of the proceedings, record and judgment of the Brazoria court in the case referred to, whereby it appeared, in substance:

That at a regular term of the District Court of Brazoria County, Texas, the case, No. 1527, of Peter McGreal, plaintiff, against Stewart Newell, defendant, was tried. The petition was the ordinary one of trespass to try title, filed May 20, 1850, wherein the plaintiff, Peter McGreal, alleging that the defendant, Stewart Newell, as well as himself, was "*a resident citizen of the county of Brazoria*," sought to recover of him various tracts of land, and among them, the tract here in controversy. The plaintiff alleged, that on February 1, 1850, he owned in fee simple the said tract, and that on the——day of that month the defendant Newell forcibly entered on and took possession thereof, and "now" unjustly and illegally withholds it, etc. On the same day, May 20, 1850, answer was filed, containing demurrer and pleas of general denial and not guilty. These recite that "*comes the defendant, Stewart Newell,*" etc., and are signed "J. A. Swett, Atty. for Deft." The court overruled the demurrer, the judgment being:

In this cause, both parties being present by their attorneys, the demurrer of defendant to plaintiff's petition came on, *and being heard by the court,* was overruled.

On the day following, May 21, 1850, final judgment was rendered. It recites again the coming of the parties by their attorneys, the hearing and overruling of the demurrer, and, "thereupon," the coming of a jury (naming each of them)—

who, *after hearing the evidence and arguments thereupon,* returned the following verdict: "We, the jury, find for the plaintiff, and that he recover the several tracts of land mentioned and described in the petition. G. GIESECKE, Foreman."

It is therefore ordered, adjudged and decreed by the court, that the plaintiff *do have and recover* of and from the defendant the several tracts of land in plaintiff's petition mentioned and described, and all thereof; that the said Stewart Newell be forever barred from having or asserting any *claim, right or title to all or any portion of the said tracts of land, or any part thereof,* and that the said *plaintiffs be forever quieted in the title and in the possession of all the aforesaid tracts of land.* It is further considered by the court, that the plaintiff recover of the defendant his costs of this suit, and that execution issue for the same. (Certif., 1–4.)

These further disclosures are made by the certificate: The defendants demurred to plaintiff's fifth amended original petition—

upon the ground that it appeared therefrom that the plaintiffs thereby attacked collaterally and alleged to be void the judgment of the District Court of Brazoria County, in the State of Texas, and within the said eastern district thereof, a court of general jurisdiction of the parties and the subject-matter connected with and involved in said judgment, and that said judgment was a domestic judgment, assailable only in a direct proceeding to impeach it, and that no proceeding had ever been

taken to review, appeal from, vacate or qualify said judgment, and that plaintiffs' right to do so is now barred by limitation and lost by laches. (Certif., 4–5.)

The defendants excepted to and assigned as error the court's adverse ruling on said demurrer. (Certif., 6–7.)

Upon the trial evidence was offered by the plaintiffs, and admitted by the court, tending to prove that Stewart Newell was neither citizen nor resident of Texas when said suit against him was instituted by Peter McGreal in the District Court of Brazoria County, Texas; that he was never served with process of any kind in said suit, and had no knowledge of its institution "*until many years thereafter*;" that J. A. Swett was not his attorney in said suit and had never been employed by him to represent him therein, and that any appearance made for him by said Swett in said suit was without his, Newell's, knowledge or consent; that in said suit the property in controversy was not taken into the possession of the court by attachment, sequestration, or other process; that said Newell had never resided in Brazoria County; that he resided in Texas, in Galveston County, from April, 1838, to November, 1848, when he left Texas, and went to Philadelphia, and resided there until 1853 or 1854, and from that time until his death resided in New York and during said years was first a citizen of Pennsylvania whilst residing there, and then a citizen of New York whilst residing there.

This evidence was objected to by the defendants—

upon the ground that said judgment in the case of Peter McGreal v. Stewart Newell was rendered by a domestic court of general jurisdiction, and that said Newell was sued as a citizen of said Brazoria County, and that the record in said suit showed that fact and showed that he was sued therein *for the recovery of land*, and that he had appeared by his attorney, demurred, pleaded and answered in the suit, and that his demurrer had been contested before the court and a hearing had on the case before a jury and that judgment was rendered in said suit for the plaintiff, and that said proceedings, judgment and record impart absolute verity, and that want of jurisdiction in said court could not be established outside of said record in a collateral proceeding such as the suit at bar. (Certif., 5.)

The objections were overruled, the evidence admitted, and defendants excepted and assigned error. (Certif., 5, 7.)

The single point in the case upon which instruction is requested was submitted by the trial court to the jury thus:—

whether or not the judgment rendered in Brazoria County, May 21, 1850, in favor of Peter McGreal against Stewart Newell was procured without service and without the authorized appearance of Stewart Newell. If the evidence satisfies your mind that Stewart Newell was not a party to the suit in fact—that is, was not served and did not enter his personal appearance, and did not authorize Mr. Swett to appear for him—you are instructed that the judgment is a nullity and the plaintiffs are entitled to recover their land, unless the defendants have it by statute of limitations. If you determine from the testimony in this case that Stewart Newell was represented in that suit by Mr. Swett and he was authorized to represent him, in that event you need not consider the plea of limitation, but return a verdict for the defendants. If Mr. Swett was authorized to appear for Stewart Newell in the litigation, you need not consider the plea

of limitation, but return a verdict for the defendants; but if you find from the testimony that Mr. Swett was not authorized to appear for him, then that judgment is a nullity and the title to this property would be in the executors of Stewart Newell, plaintiffs in this case, unless you find under the plea of limitations, which I shall instruct you upon, in favor of the defendants. * * * If you find from the evidence in this case that Stewart Newell authorized Mr. Swett to appear for him in that case, the judgment is valid, but if you find he was not authorized to appear for him, then the judgment is a nullity. The burden of proof is upon the plaintiffs to show nullity of the judgment in Brazoria County. (Certif., 5–6.)

The defendants excepted to this charge and requested, instead, an instruction for themselves, in that the Brazoria judgment put the title to the land in McGreal, from whom it had passed to them; but the court refused the instruction, the defendants excepting. Thereupon, the jury returned a verdict and the court rendered judgment for plaintiffs for the land. (Certif., 6.)

At every stage of the hearing, from the court's disposition of the demurrer to its refusal to instruct the jury as requested by defendants, the defendants duly excepted to the court's action and assigned error. (Certif., 6–7.)

The record being thus, the Circuit Court of Appeals seeks here an answer to this question, to wit:

Was the judgment of the District Court of Brazoria County, Texas (said court being a court of general jurisdiction), in the case of Peter McGreal v. Stewart Newell, subject to collateral attack in the United States Circuit Court for the Eastern District of Texas, sitting in the same territory in which said District Court sat, in this suit, between a citizen (citizens?) of the State of New York and a citizen (citizens?) of the State of Texas, by evidence *aliunde* the record of the State court, showing that the

defendant, Stewart Newell, in said suit in said State court was not a resident of the State of Texas at the time said suit was brought nor a citizen of said State, but a resident citizen of another State, and that he was not cited to appear in said suit, and that he did not in fact appear in said suit, and that he did not authorize J. A. Swett, the attorney who purported to appear for him in said suit, to make any such appearance, and that the appearance by said attorney was made without his knowledge or consent? (Certif., 7.)

BRIEF AND ARGUMENT FOR PLAINTIFFS IN ERROR.

The plaintiffs in error affirm that the question certified by the Circuit Court of Appeals should be answered in the negative.

FIRST.

The judgment rendered by the District Court of Brazoria County, Texas, at its May term, 1850, in favor of Peter McGreal, plaintiff therein, and against Stewart Newell, defendant therein, in case No. 1527, for the land there and here in controversy, was and is a *domestic* judgment of a court of general jurisdiction, and therefore, impervious to collateral attack for matters *aliunde* the record in said case.

It is plain that the Brazoria judgment was a domestic judgment of a court of general jurisdiction, rendered on a petition alleging the residence and citizenship of the defendant in Brazoria County, and asserting against him a right to recover a subject matter within the court's

jurisdiction; and on the defendant's defensive pleadings, both of law and fact, reciting his appearance to contest the plaintiff's petition; and that the judgment itself recites the coming of the parties by their attorneys, the argument and submission by them, and the adjudication by the court of the issues of law made by the defendant's demurrer, and thereupon the coming of a jury, and their returning, "*after hearing the evidence and argument*," of a verdict for the plaintiff, followed by adjudication by the court in the plaintiff's favor of the issues of fact made by the defendant's pleas.

That such an assault as was made by the plaintiffs here upon such a record is idle and can not prevail is settled —certainly in Texas—beyond peradventure.

Murchison v. White, 54 Texas, 82—not for the first nor the last time, but in terms so perspicuous as in an especial manner to justify their use as an unambiguous statement of the doctrine accepted by our courts as of universal application—declares:

> It is believed that a careful analysis of the cases on this subject will show that, in a *collateral* proceeding, the *only* contingency in which the judgment of a domestic court of general jurisdiction, which has assumed to act in a case over which it might by law take jurisdiction of the subject matter and the person, can be questioned, is *when* the *record* shows *affirmatively* that its jurisdiction did *not* attach in the particular case. Freeman on Judgments, §§ 131–4, 334; Hammond v. Wilder, 23 Vt., 346, cited approvingly in Christmas v. Russell, 5 Wall., 307; Guilford v. Love, 49 Texas, 715; Fitch v. Boyer, 51 Texas, 337; Williams v. Ball, 53 Texas, 603.

The question in such a proceeding *must be tried by the recitals in the record itself*, and the presumptions arising therefrom. If *they* show a case of jurisdiction, then in a *collateral* proceeding, upon grounds of public policy, *the record purports absolute verity and is conclusive.* Freeman on Judgments, §§ 132–4.

If, however, *from the record itself*, it should *affirmatively* appear either that the court did not have jurisdiction on the subject matter or of the person, in a case where this was also required, or that the jurisdiction had not attached in the particular case, *then* the question can be raised upon objection to the record when offered in evidence, and no affirmative proceeding need be prosecuted to vacate it. Being a nullity *upon its face*, it could not legally be invoked against those whose just rights were sought to be affected by it.

As a general rule, in *all other* cases where such judgment is sought to be collaterally impeached *by matters dehors the record, and which must be sustained by proof aliunde*, as in case of alleged fraud of a party, this must be done by *some proper affirmative* proceeding, and which also, upon grounds of public policy, must be instituted within the time enjoined by law. Pearson v. Burditt, 26 Texas, 157.

See, among other Texas cases:

Williams v. Haynes, 77 Texas, 283, where the judgments attacked collaterally were held to be conclusive, because they *recited the appearance* of the defendant therein—*although, upon the evidence and in fact*, that recitation was *false*, and *the suits, proceedings and judgment were without the defendant's knowledge, and without authority fron her or her authorized agent.*

Lawler v. White, 27 Texas, 250, was to the same effect. The action was as here, and the plaintiff alleged the nullity of a former judgment, rendered in 1843, under which the defendant claimed title, and prayed that it be vacated, because the defendant therein, whose title the

plaintiff held, had never been served or cited in person, by publication or otherwise, in that suit. The judgment assailed recited that it appeared that the order of publication made at a former term had been duly executed, and, "the defendant not appearing, the cause was heard upon the bill of the complainant," etc., the decree for the plaintiff for the land sued for following. The court, 153–4, held that the plaintiff could not disprove the recitation of the decree by evidence *aliunde*, and that even in case a record is *silent* on the subject of notice, "the judgment of a court of general jurisdiction *will support itself*, and can not be collaterally impeached or called in question, because of any alleged *want of jurisdiction over the parties* to the decree."

Treadway v. Eastborn, 57 Texas, 209, affirmed the conclusiveness against collateral attack of a default judgment reciting the default of the defendant, "*although duly served with process*," notwithstanding it appeared from the return on the writ that service *could not have been had*. The court said that the rule of a conclusiveness and absolute verity applied to every judgment of a domestic court of record of general jurisdiction wherein the record of the case—and particularly the judgment—recites "the due service of process or *other facts which would give the court jurisdiction of the person*."

Fitch v. Boyer, 51 Texas, 336, affirms the judgment of a trial court against the contention of the appellant, 341, that that court erred in refusing to admit evidence *aliunde* that a judgment, necessary to the title of his ad-

versary, was rendered *without service of notice of any kind on the defendants therein; that no one was authorized to appear for them in the suit resulting in said judgment; and that they resided at the time in a county other than that wherein said suit was brought, "and did not know of the suit."* The judgment to which the offered evidence was directed recited appearance of the plaintiffs by attorney, and that the defendants failed to appear and answer, but wholly made default—*there being no recital of service on the defendants.*

The court, 334, said:

> Whatever may be the hardships of the particular case, yet, upon consideration of public policy and from the weight of authority, we deduce, as the true rule, the proposition, that a domestic judgment of a court of general jurisdiction upon *a subject matter* within the ordinary scope of its powers and proceedings is entitled to such absolute verity that in a collateral action, *even where the record is silent as to notice*, the presumption, *when not contradicted by the record itself*, that the court had jurisdiction of the *person also*, is so conclusive that evidence *aliunde* will not be admitted to contradict it. Lawler v. White, 27 Texas, 250; Guilford v. Love, 49 Texas, 715; Galpin v. Page, 18 Wall., 350; Hahn v. Kelley, 34 Calif., 391; Hare & Wall., notes to Mills v. Duryee and McElmoyle v. Cohen, 2 Am. Lead. Cases, 548; Freeman on Judgments, sec. 124, and authorities cited in note 2.

Letney v. Marshall, 79 Texas, 513, was also trespass to try title, brought by Letney. The defendant relied on a judgment against Letney for the land, wherein it was recited that the "defendant Fowler Letney has answered by general exceptions and pleas of general issue and not guilty," and defeated the pending action. Letney, on appeal, insisted that the judgment put in evidence against

him was null and void and subject to collateral attack, and that the trial court erred in excluding evidence *aliunde* to impeach it, because—

> The judgment * * * was rendered without the issuance of citation or acceptance of citation or the service thereof, *but was rendered upon an answer filed by R. E. Borden, without the knowledge, consent or authority of the appellant, or anyone acting for him.* 514.

Affirming the judgment, the Supreme Court, 515, said:

> Appellant offered, but the court refused to permit him, to prove that he was never served with citation in the cause in which said judgment was rendered; *had never voluntarily appeared therein or authorized anyone to appear for him, and especially, that he neither authorized the filing of said answer nor had any notice that it had been filed until after this suit was brought.*
>
> It is *well settled by the decisions of this court* that a judgment can not be impeached in the manner proposed. Murchison v. White, 54 Texas, 82; Fitch v. Boyer, 51 Texas, 344; Lawler v. White, 27 Texas, 25; Wilkerson v. Schoonmaker, 77 Texas, 617.

Alston v. Emerson, 83 Texas, 231, was an action to recover lands, wherein the rights of the parties depended on the validity of a judgment theretofore rendered by a District Court in Texas partitioning the lands among the heirs of one Alston—it being claimed by the defendants, who at the time of its rendition were minors, that said judgment was void because they were not cited in the suit of which it was the result. Citations were issued to them in due course, but the returns made on these citations showed they were not served, the defendants not being found. *No other citations were found among the papers of the case, and the record did not affirmatively*

show that any others were issued. The defendants were represented in the case by a guardian *ad litem* appointed by the court. There were no recitals in the judgment that defendants had been served with citation, or that the court had jurisdiction over their persons, save this:

> This day came the parties by their attorneys, and waive a jury, and submit the matters in controversy, as well of fact as of law to the court; and the evidence and argument of counsel being heard, etc. 235.

The defendants in the pending suit, over the objection of the plaintiffs, testified that they were never served with citation in the partition suit; knowing of it, however, shortly after the partition was made. There was judgment for the plaintiffs, which was taken to the Supreme Court by the defendants and submitted there as an agreed case, and affirmed.

The following is a sufficient transcription of the agreement of the parties and the opinion of the Supreme Court, to present the point of our contention:

> It is admitted by the parties that unless it *affirmatively* appears from the *record*, as above set out in said partition proceedings, that the court did not have jurisdiction over the persons of defendants, or unless they could show a want of jurisdiction over their persons by *oral* evidence, that then said judgment is valid and binding on defendants. The parties, therefore, submit for the decision of the Supreme Court the following issues:
>
> 1. Does the record in such partition proceedings as above set out show *affirmatively* the want of jurisdiction over the persons of defendants?
>
> 2. If the *record* does *not* show the want of jurisdiction over the persons of defendants, can it be shown by the *oral* evidence of the defendants themselves in this proceeding?

3. If, however, the court did not have jurisdiction over the persons of the defendants, but nevertheless appointed a guardian *ad litem* for them, who represented them throughout the proceedings, what would be the effect of the judgment rendered under such circumstances against the minor defendants?

* * * * * * * *

The court said:

In the view taken of one question involved in this case *it is not necessary to consider the first and second issues submitted; for if it be conceded that it was shown in any lawful manner that appellants were never served with process in the partition suit, still all the members of this court, concur in holding, under the former decisions of this court that the judgment through which appellee acquired right was at most only voidable.*

It appears that appellants were represented by a guardian *ad litem* appointed by the court, and the question whether a judgment rendered under such circumstance against a minor not actually brought into court by service of process was void or only voidable was considered, after having been long held under advisement, by this court in the case of McAnear v. Epperson, 54 Texas, 220, in which it was held, that a judgment rendered without actual service of process on the minors who were represented by a guardian *ad litem* was not void. That decision has doubtless been often acted upon, *it has become a rule of property*, and in view of the great conflict of authority upon the question involved, were this not so, we would not feel authorized now to establish a different rule. The case referred to is in harmony with the former decisions of this court. Thomas v. Jones, 10 Texas, 52; Kegans v. Alcorn, 9 Texas, 34; Wheeler v. Ahrenbeak, 54 Texas, 536.

Cases have been before this court on appeal or writ of error in which judgments were reversed for want of service on minors, notwithstanding they were represented by guardians *ad litem*, and expressions may be found in some of these cases from which the inference might be drawn that the writer of the opinion may have inclined to the view that judgments rendered under such circumstances were void. Kremer v. Haynie, 67 Texas, 451; Sprague v. Haines, 68 Texas, 218. The difference between *void*

and *voidable* judgments, and between *direct* and *collateral* attacks on judgments, are too well understood to now require statement.

The judgment under consideration in this proceeding must be held binding on appellants. 237.

There can be no serious contention that the law in Texas is other than is declared in the cases cited, and in many others not necessary to be added to our summary.

Only two Texas cases were invoked on the point by the defendants in error in the trial court, and these are in harmony with the rule, as we claim it to be:

Merritt v. Clow, 2 Texas, 582: The decision does not involve the question at all. Clow sued Patterson and others for damages, and a final judgment by agreement was entered for the plaintiff for a named sum—the defendants purporting to act in making the agreement "by their attorney and agent, Josiah J. Crosby, Esq., one of the attorneys of this court."

After adjournment of the term of court during which this judgment was entered, the defendants therein, in vacation, petitioned the judge of the court for a rehearing and perpetual injunction of the judgment, alleging that said Crosby had never been employed by them to act as their attorney in the premises, and that the judgment had been rendered without their consent or knowledge, and was otherwise illegal.

The judge granted the injunction, but dissolved it, upon the coming in of Clow's answer denying the allegations of the petition, and then, on motion, the petition was continued over for final hearing. Before the next

term of the court a writ of error was obtained for the purpose of taking to the Supreme Court the proceedings in the original case and in the injunction case, and it was upon this writ that that court took jurisdiction of and decided the controversy between the parties. After the writ was taken, the parties entered into an agreement reciting what had been done, and that the decree made by the court on the injunction did, in effect, dismiss the bill for injunction, notwithstanding said bill was, through mistake, ordered by the court to stand for final hearing, and that the entry of said decree be amended, *nunc pro tunc*, to show that the bill was dismissed.

The Supreme Court refused to consider the questions presented by the petition for injunction, because, notwithstanding the agreement of the parties, the decree of the lower court dismissing the petition was interlocutory and not final. It was said, in effect, that, the decree being merely interlocutory, the complainants could have conducted *that* suit to final hearing upon evidence of the matters alleged in their bill, and obtained a decree perpetuating the injunction, in case they maintained their allegations.

That is to say, the bill being a *direct* assault on the original judgment, and *in the court where it was rendered*, the complainants, maintaining their allegations, would have been entitled to relief, since against an attack of *that kind in that forum*, they would not have been *concluded* by the unauthorized acts of the attorney, Crosby.

Even in the course of its observations on this point the court, while dissenting from, cites "the authority of a very learned court" (Denton v. Noyes, 6 J. R., 295) to the doctrine, "that where an attorney of the court has confessed a judgment against a party, who has not even been served with process, and without the authority or even knowledge of the party, the judgment so confessed is not only regular, but conclusive."

Proceeding, the court declares the *only* question to be the regularity and validity of the judgment enjoined and sought to be reversed, and affirms the judgment. It is said in the opinion:

> The judgment purports to be by consent and confession, upon agreement and compromise between the plaintiff in that suit (the defendant in error) and the plaintiffs in error—the latter appearing and acting by their "attorney and agent, Josiah J. Crosby," one of the attorneys of this court.
>
> * * * * * * *
>
> The record of the judgment must be regarded as at least *prima facie* evidence of the truth of its contents, and not having been successfully controverted, must be taken as true. 588–9.

That is to say, the court in this *direct* attack (*by writ of error to trial court*) on the judgment would have relieved the plaintiffs in error of its burden, but for the fact that the recitations of the record, if true, authorized the judgment, and must be accepted as true in the absence of successful contradiction.

Parker v. Spencer, 61 Texas, 155, in so far as it can be construed to hint at the question before us, was the case of a *direct* attack, apparently in the court rendering it, of

a judgment alleged to have been entered against the plaintiff (a defendant in the judgment) by agreement of attorneys purporting to represent him, but in fact without any authority whatever to represent him in the case in any manner.

The plaintiff, without objection, introduced evidence to his allegations, and, upon special issues submitted to them, the jury returned a verdict for him, and the court gave him judgment accordingly.

Affirming, the appellate court, 161, said:

> In response to special issues, the jury found that Spencer was not represented by any authorized attorney in the suit wherein the consent decree was rendered, and that he had not been served with process, and that the party who had accepted service for him did so without authority, and the attorneys who appeared for him were not authorized by him to make such appearance, or to represent him in the suit. There is sufficient evidence in the record to sustain that finding, and to the admissibility of which no objections were made. And as he had not been made a party to the suit by any of the modes known to the law, he would not be bound by the judgment. But he had the option either to have it vacated by direct proceeding or else to treat it as void in any collateral proceeding where rights might be asserted against him by reason of the same.

In so far as the closing sentence of this abstract is to the effect that the plaintiff had the "option" to treat the judgment assailed as void in a *collateral* proceeding, it is a mere *dictum*, and even as a *dictum* seems to have no companion in our reports. The *point* before the court for *decision*, and *decided*, was that the plaintiff by a *direct suit for that purpose* had the right, on sufficient evidence, to set the unauthorized judgment aside.

Four other Texas cases, in addition to the one last reviewed, were cited in the brief of the plaintiff in error in the Circuit Court of Appeals. None of them antagonizes our contention.

Fowler v. Morrill, 8 Texas, 157, decides that the presumption of law that an attorney at law is authorized to acknowledge service of citation for a defendant sued, does not extend to one who does not appear to be such attorney and is not shown to be an attorney in fact. The decision is made by the Supreme Court in response to a *direct* attack—by writ of error—on a judgment of the trial court based on the sufficiency of the acknowledgment of service.

Bender v. Damon, 72 Texas, 92, is irrelevant. The decision was that the trial court erred in sustaining a *demurrer* to the plaintiff's petition alleging facts which, if true, rendered the judgment of another court assailed by the plaintiff, void. The alleged facts were that the plaintiff was a non-resident; was never cited to appear, and did not appear in person or by attorney in the suit resulting in the judgment; and that the defendants claim title to the land involved through execution and sale under the judgment. The court said:

> If these averments be true, the judgment was void and no one could acquire rights under it. *The demurrer admits the averments to be true.*
>
> How the facts may appear *if appellant is put to the proof of his averments*, is now unimportant, for the action of the court in dismissing the petition prevented any inquiry as to this. 94.

Clearly had the plaintiff been permitted to proceed to his proof, *and been confronted by a record, showing appearance in the suit and defense thereof by attorney, for him*, his attack on the judgment would have failed. Likewise *had his petition exhibited such record as part of his averments*, the Supreme Court must have affirmed a judgment of the trial court sustaining the demurrer.

Morgan v. Morgan, Court of Appeals, 21 S. W. R., 155; 1 Texas Civ. Ap. R., 317, merely declares the general rule that the judgment of "a *sister* State or Territory" may be collaterally attacked in the courts of Texas.

Paul v. Willis, 67 Texas, 261, 265, declares a judgment attacked collaterally void, *because the record in the proceeding resulting in the judgment showed affirmatively that it was void*. The court expressly refers to *Murchison v. White*, 54 Texas, 81, *supra*, as correctly *excluding from consideration* evidence *aliunde* the record.

SECOND.

The attorneyship of Swett for Newell is, like every other jurisdictional fact, concluded by the Brazoria record in the suit of Peter McGreal v. Stewart Newell.

It was insisted by the defendants in error that the court in rendering judgment in the Brazoria case did not *adjudge that Swett was the attorney for Newell*, and that, therefore, it remained open to them to allege and prove that he was *not*, without infringing the rule that inhibits collateral attack of domestic judgments of courts of general jurisdiction.

The Texas cases, as has been already seen, necessarily involve the negation of this contention and affirm our proposition. And so are the authorities elsewhere.

The rule is, that where collateral attack is made on the judgment of a court having jurisdiction of the subject matter, and the question is whether the court had the right to proceed to judgment in the particular case—that right depending on the existence of certain facts, as, for example, that the defendant had notice, or appeared in person or by authorized attorney—and the court by so proceeding adjudged that it had jurisdiction in the particular case, it *thereby adjudged, as well, the existence of the certain facts*, and this adjudication is not accessible to such attack.

Field v. Gibbs, 1 Peters C. C. R., 155, was an action of debt brought in the United States Circuit Court in *New*

Jersey on a judgment of a State court of *Pennsylvania* against the defendants. One of the defendants pleaded that at the time when the proceedings in the Pennsylvania court were *commenced, and always, before and since, he was a citizen and resident of New Jersey, that no process was served on him in that suit, nor had he any notice or opportunity to defend himself therein; that he never appeared in that court in said suit, nor consented to any of said proceedings, nor authorized anyone to consent for him thereto; and therefore, as to him, said judgment was void.*

To this plea the defendant demurred, and the court, by Washington, J., sustained the demurrer and gave the plaintiff judgment.

It was said:

Upon examining the record of this judgment, it appeared by the *declaration* that Martin and Joel Gibbs were attached to answer the plaintiff in that suit; and both of the defendants *appeared by John P. Ripley, their attorney, and pleaded several pleas. In every succeeding stage of that cause, until the judgment was rendered, it is stated in the record, that both defendants appeared by the same attorney.* The question then is, can the defendant, Martin Gibbs, plead in bar of the court on this judgment, that he *was not served with process,* and *did not appear* in the case, or *authorize any person to appear for him.*

The general rule of law, *to which I know of no exception,* is, that *nothing can be assigned for error, nor can any averment be admitted, which contradicts a record.* "A record," says Lord Coke, "imports in itself such incontrollable credit and veracity, that *it admits of no averment, plea, or proof to the contrary;* for otherwise there would never be an end of the controversy." * * * But what, it may be asked, is to be done if the judgment has been obtained against a person, *residing out of the State,* who was never

served with process, or *even notified of the existence of the suit* in which it was rendered? I answer, that *his remedy in the same, and no other, as would be open to him if the suit had been brought in the State where the judgment was rendered?* * * * The injury complained of in this case might have resulted *if the defendant had lived in Pennsylvania, and this suit had been brought there;* but *he could not have pleaded the same matter in bar of the action on the judgment,* which he *has* pleaded in *this* suit; nor can a sound reason be given why it can be pleaded in *this* court.

Landes v. Brant, 10 How., 348, was error to the Circuit Court of the United States from the district of Missouri, in an action of ejectment. The plaintiff below established title under one Clamorgan; but the defendant defeated the action by connecting himself with the title derived from an execution sale of the land made under a judgment recovered against Clamorgan by one Sarpy, in the District Court of St. Louis. It was insisted against this judgment that it was void, and assailable collaterally for want of jurisdiction over the person of the defendant. The Supreme Court said:

The objection to the judgment is, that no process seems to have been served on Clamorgan, and it is proved that he was absent in Mexico at the time; but the record of the judgment states, that "now at this day *came the parties by their attorneys,* and neither of said parties requiring a jury, but this case with all things relating to the same being submitted to the court, for that it appears to the court that said Sarpy had sustained damages," etc. And then a judgment follows.

A defendant's being beyond the jurisdiction of a court is not conclusive evidence that the judgment was void; he may have left behind counsel to defend suits brought against him in his absence, by which means his property could be reached by attaching it; and the proof shows it to be probable enough that such was Clamorgan's condition when the judgment was ren-

dered. *But the validity of the judgment does not depend on this consideration.* If it was voidable for want of notice, and a false statement on its face, "that the parties appeared by their attorneys and dispensed with a jury, and submitted the facts to the court," then it should have been set aside by an *audita querela*, or on petition and motion; such being the familiar practice in similar cases.

Furthermore: This suit in ejectment is *collateral* to the judgment; and *it can not be impeached collaterally. So the Supreme Court of Missouri held* in 1848, in the case of Landes v. Perkins, 12 Mo. R., 254, on the same title, and a *similar record* in all respects to that before us, and with the views on this point there expressed we entirely concur.

1 Smith's Lead. Cases, Part 2, 1127:

The requisitions of natural justice are satisfied by establishing tribunals, whose duty it is to ascertain that notice has been given, and not to proceed against anyone without giving him an opportunity of being heard; Callen v. Ellison, 13 Ohio N. S., 446, 455; and policy demands that when such a tribunal has pronounced judgment, its adjudication should be as conclusive on the question *whether the defendant was duly notified* as on any other point essential to the determination of the cause: Trimble v. Long, 13 Ohio, 431, 439. If an error is committed from want of evidence or inadvertence, and a party shut out from making a just defense, still the rule that there must be an end to litigation will prevail and redress must be sought in a writ of error when the defect appears on the face of the record, or in an application to the court which rendered the judgment when it does not. *A recital that the defendant appeared in person or by attorney can not be contradicted, or the authority of the attorney disproved by extrinsic evidence.* Callen v. Ellison; Trimble v. Long.

So, too, 2 *Am. Lead. Cases*, 803, 813.

Brown v. Nichols, 42 N. Y., 26, embodies the rule in the first head note:

A judgment recovered against a defendant *who was not served with process and had no knowledge of the suit, but for whom an attorney appeared without authority,* can not be attacked for the want of jurisdiction in any collateral proceeding, and is binding upon such defendant.

Dissent by one of the judges is erroneously intimated in the head note; the dissent was on another point, and the rule quoted was expressly affirmed:

In the following cases this question is discussed and decided, both in regard to causes where there *was,* as well as where there *was not,* service of process upon the party for whom the attorney appeared without authority from such party; *and they fully sustain such appearance.* Hamilton v. Wright, 37 N. Y., 502; Am. Ins. Co. v. Oakley, 9 Paige, 496; Denton v. Noyes, 6 Johns. R., 296; Jackson v. Stewart, Id., 34; Republic of Mexico v. De Arangoiz, 5 Duer, 643. * * * I think the law, as settled in this State, rests upon principle as well as authority. The attorney is an officer of the court, acting under oath, and liable to be disgraced and punished for such gross violation of duty, as to fraudulently appear in an action without authority; and I apprehend the instances are rare indeed when it has occurred. Again, a contrary rule would, it seems to me, be impracticable, *as the title to real property depends to a great extent on the records of the courts,* it would be a great hardship to compel parties *in tracing titles acquired through such records,* in every instance where a judgment has been entered, *to inquire into the particular authority which an attorney had to appear in such actions.* Indeed, the effect of such a rule would be to create positive distrust as to the soundness and regularity of such titles. I think the objections, on the grounds of hardship and danger, urged against upholding such appearance by an attorney rest more in theory than practice. 32–3.

Ferguson v. Crawford, 70 N. Y., 253, reviews the case just cited, and distinguishes it from the case there under consideration. Indeed, there is in the opinion in that

case one of the most exhaustive reviews and discussions of adjudged law on the subject of the force of judgments —whether foreign or domestic, and whether upon direct or collateral impeachment, or at law or in equity— to be found anywhere in the books. The number of the citations, and the skill displayed in assigning them by groups to the support of the respective propositions stated and discussed in the opinion; the largeness and vigor, if not the soundness, of the argument, and the light reflected by it upon the whole subject to be considered at one or another stage of the present discussion —all justify, if they do not demand, thorough examination of that case.

It was an "action" to foreclose a mortgage, held by the plaintiff on real estate in Westchester County, New York. One defense was, that the plaintiff's rights had been barred by a judgment of a court of that State foreclosing a prior mortgage, in favor of one McFarquahar, on the same property, under which the property had been sold to the defendant—the plaintiff having been a defendant in that action, appearing therein by one Mills, as his attorney, but not filing an answer.

To support this defense, the defendants put in evidence the judgment roll in the action last named. The roll contained notice of appearance for the present plaintiff, and consent that judgment be entered, purporting to be signed by Mills. The judgment was entered by default for want of an answer, and on this consent, and recited that summons had been served on the defendants

therein, and that none of them had appeared except the present plaintiff, by John W. Mills, his attorney, and some others who were named in the decree.

Thereupon the plaintiff offered to prove *by Mills* that the latter's signature to the notice of appearance and consent was a *forgery;* that he was *never authorized* to appear for the plaintiff; and that he *never did* appear for him.

The *judgment roll did not* show that a service of summons was made on the plaintiff, and *it was conceded as a matter of fact, that no such service was made.*

The sole reliance of the defendants was the recital in the judgment and the notice of appearance contained in the judgment roll, their contention being that these, in a collateral action, import absolute verity, and can not be contradicted by extrinsic evidence. They cited Brown v. Nichols, 42 N. Y., 26, *supra,* as decisive. The court declared that case inapplicable—in that it ruled merely that the *non-authorization* of an attorney, *who did in fact appear,* could not be disputed; whereas, in the pending case the offer was to prove not only that the attorney was *not authorized* to appear, but that he *did not in fact* appear, and that the *pretended* appearance was a *forgery.* Stating the general rule to be, that it is essential to the binding effect of a judgment of any court that there should be jurisdiction of the person as well as of the subject matter, and that the difficulty is as to the *manner* in which want of jurisdiction must be made to appear, in the case of a judgment of a domestic court of general

jurisdiction acting within its general powers, when questioned in a collateral action—whether, the record being silent as to the means used to bring the parties into court, it may be proved that they were not summoned and did not appear; or whether record recitals, that they were summoned and did not appear, may be contradicted; or whether jurisdiction is presumed by law and can not be disputed, unless the want of it appear on the face of the record—the court declares this difficulty to be exhibited by as much diversity of opinion as has arisen upon any general question that can be mentioned.

The cases are then classified somewhat in this wise:

1. Those holding that "sister State" judgments of general jurisdiction—though entitled to the presumption of jurisdiction obtaining in favor of judgments of like courts of the State wherein they become the subjects of consideration—may be overthrown by extrinsic evidence that jurisdiction did not in fact exist, although the judgment records recite the necessary jurisdictional facts, as that process was served, or that there was appearance by attorney. Borden v. Fitch, 15 John., 121; Starbuck v. Murray, 5 Wend., 148; Shumway v. Stillman, 6 Wend., 447; Kerr v. Kerr, 41 N. Y., 272; Hoffman v. Hoffman, 46 N. Y., 30.

The citations, it will be observed, are confined to New York cases; but the court adds that the same rule prevails in some of the other States—although some have held, even as to *such* judgments, record recitals showing jurisdiction are conclusive.

Field v. Gibbs, 1 Peters C. C. R., 165; Roberts v. Caldwell, 5 Dana, 512; Ewer v. Coffin, 1 Cush., 23; 1 R. I., 73; Shelton v. Tiffin, 6 How., 186.

2. Those containing *general expressions* seeming to sanction, and sometimes cited as authorities for, the application of the rule stated to *all* judgments; but *really* being cases relating either to judgments of *inferior* courts, or courts of *limited* jurisdiction, or courts of general jurisdiction *exercising special statutory* powers, or courts of *sister* States, or to judgments *disclosing on their face* the want of jurisdiction, or to judgments *directly* assailed.

Elliott v. Piersol, 1 Peters, 340; Hollingsworth v. Barbour, 4 Peters, 466; Hickey v. Stewart, 3 How., 750; Shriver v. Lynn, 2 How., 43; Williamson v. Barry, 8 How., 495; Williamson v. Ball, Id.; Girvin v. McCowall, 8 Sm. & M., 351; Enos v. Smith, 7 Sm. & M., 85; Campbell v. Brown, 6 How. (Miss.), 106; Schafer v. Gates, 2 B. Mon., 548; Wilcox v. Jackson, 13 Peters, 498; Miller v. Ewing, 8 Sm. & M., 421.

3. Those holding that the want of authority of an attorney to appear may be shown by extrinsic evidence, although the record states that an attorney appeared for the party, placed—*expressly* on the ground that such evidence does not *contradict the record.*

Bodurtha v. Goodrich, 3 Gray, 508; Shelton v. Tiffin, 6 How., 186; 14 How., 340.

These, however, conflict with Brown v. Nichols, 42 N. Y., 26, and many other New York decisions.

4. Those holding that *domestic* judgments can not, in collateral actions, be shown to have been rendered without jurisdiction, and that the law conclusively presumes the jurisdictional facts existed, unless it appears on the face of the records that they did not.

The citation of authorities of this class is preceded by the following declaration of the court:

After considerable research, I have been unable to find a single authoritative adjudication, in this or any other State, deciding that in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction over the person may be shown by extrinsic evidence, while there are a great number of adjudications in neighboring States, holding that, in the case of *such* judgments, parties and privies are estopped in *collateral* actions to deny the jurisdiction of the court over the *person* as well as the *subject matter*, unless it appear *on the face of the record* that the court had not acquired jurisdiction; and that in such cases there is a *conclusive presumption of law* that jurisdiction was acquired by *service of process, or the appearance of the party.* The cases are very numerous, but the citation of a few of them will suffice. 258.

Cook v. Darling, 18 Pick., 393; Granger v. Clark, 22 Maine, 128; Coit v. Haven, 30 Conn., 190; Penobscot R. Co. v. Weeks, 62 Maine, 456; Wingate v. Haywood, 40 N. H., 347; Clark v. Bryan, 16 Md., 171; Callen v. Ellison, 13 Ohio St., 446; Homer v. Doc, 1 Ind., 131; Wright v. Marsh, 2 Iowa, 94; Pierce v. Griffin, 16 Iowa, 552; Hahn v. Kelly, 34 Calif.—full and instructive discussion, and many citations; Smith's Lead. Cas., marg. p. 842.

The court, after considering many New York cases, concludes that there is no reason in *that* State for distinc-

tion between domestic and other judgments whereby the one and not the other should be protected from attacks on the jurisdiction of the courts rendering them. It admits, however, that the conclusion must rest upon the local law of the State, "*as it finds no support in adjudications elsewhere;*" and relies on the blended system of legal and equitable administration prevailing in the State to justify the peculiar result attained by the argument. 267.

The plaintiff was permitted to contradict the jurisdictional recitals in the judgment against him — *because* his action was *equitable*, and being in a court of *equity*, he was entitled to show that the defendants ought not *in equity* to avail themselves of the judgment. 268.

Carpentier v. City of Oakland, 30 Calif., 439, seems to have been a suit on a judgment brought in the same court that rendered the judgment. In the original suit— against the City of Oakland — process was served on the mayor, and the city appeared by an attorney, who answered. A referee took testimony and reported a judgment against the city, which was entered. In the suit on that judgment the defendant answered, that the service in the former suit was on one whose official term as mayor had expired before such service was made; that the employment of an attorney to defend that suit was collusive, and that the court acquired no jurisdiction of the defendant.

On the trial of the second suit the defendant declined to avail of the court's permission to amend its answer by averments appropriate to a bill in equity to cancel the judgment, and the court excluded evidence to the points that the mayor's term had expired when service was made, and that the attorney had wrongfully appeared, holding such evidence inadmissible under the answer. But at the *plaintiff's* request, the court admitted evidence as to the alleged fraud and collusion between the plaintiff, the mayor, and the attorney who appeared for the defendant in the original suit. *Inter alia*, the record of judgment was put in evidence. The court instructed the jury that they had nothing to do with that record, the force and effect of which the court determined on inspection, nor with *other* questions *affecting the jurisdiction*; but that, since the *plaintiff* had not objected to evidence that the judgment was obtained by *fraud* and *collusion*, they should give the defendant a verdict, if they found that the judgment was so obtained.

The defendant, appealing from an adverse judgment, insisted that the court erred in excluding the evidence as to the sufficiency of service of process in the original suit, and as to whether the attorney rightfully appeared for the defendant therein.

The court stated the simple and only question to be:

Whether at common law, in an action of debt upon the judgment of a court of general jurisdiction, the defendant could show fraud, or a want of jurisdiction *aliunde*? 445.

Answering the question negatively, and as too well settled by authority to require argument, the court proceeds:

The validity of the judgment can not be collaterally attacked on the ground of fraud; *nor can it be attacked on the ground that the court had no jurisdiction, whether the supposed want of jurisdiction is alleged as an element of fraud or not, unless the want of jurisdiction appear upon the face of the record.* The maxim of the law is, that the judgment of a court of general jurisdiction imports absolute verity, and its truth can not be questioned, either by showing *otherwise than by the record itself* that the court had *no jurisdiction*, or that *its jurisdiction was fraudulently procured.* Both upon the merits of the cause of action and upon *all jurisdictional facts* the record imports absolute verity in law, and is to be tried by the court *on inspection of the record only.* Hence at law the validity of the judgment can be put in issue by the plea of *nul tiel record* only, and if on inspection it turns out that the plea is not true, there is an end of the controversy. If its validity is to be impeached *from without*, some *other appropriate* remedy must be sought. Coit v. Sheldon, 1 Tyler (Vt.), 300; Town of St. Albans v. Bush, 4 Vt., 58; Town of Huntington v. Town of Charlotte, 15 Vt., 46; Granger v. Clark, 22 Me., 128; Anderson v. Anderson, 8 Ohio, 108; Cook v. Darling, 18 Pick., 393; Coit v. Havon, 30 Conn., 190; Mills v. Duryee, 7 Cranch., 481.

In the present case the defense of *nul tiel record* is not made, nor could it have been sustained if made upon the facts of the case. On inspection the *record* shows that the defendant *appeared by attorney*, and thereby placed itself within the jurisdiction of the court. If, as alleged, *the attorney appeared without authority, that fact can not be shown in a suit at law upon the judgment.* Courts of law hold the record conclusive and uphold the validity of the judgment, notwithstanding, leaving the defendant his remedy against the attorney for damages, if solvent, or to his remedy in equity if insolvent. Hoffmire v. Hoffmire, 3 Ed. Ch. R., 173; Ward v. Barber, 1 E. D. Smith, 423; The American Insurance Co. v. Oakley, 9 Paige, 496; Coit v. Sheldon, *supra;* Town of St. Albans v. Bush, *supra.*

The doctrine contended for by counsel for defendant, to the effect that if a judgment be obtained by *fraud*, or be rendered by a court *not having jurisdiction*, it may be treated by the defendant as an absolute nullity from the start, and that it is competent for him to show *aliunde* that he was not amenable to the jurisdiction of the court as a matter of defense at law, to an action brought upon the judgment, *can not be sustained upon principle or authority.* That fraud vitiates everything, including the judgments and decrees of courts, and that judgments rendered by courts not having jurisdiction are null and void, are expressions running through all the books, it is true. These expressions, however, are but the expressions of abstract truths, and are to be understood in a qualified sense. They mean nothing more than that such is the case *when the fraud and the want of jurisdiction has been made to appear in the proper mode and by competent evidence.* Until the fraud or the want of jurisdiction has been shown in the proper mode and according to the rules of evidence, it can not be said in a strict legal sense that the judgment is void; for it has the form and semblance of a valid judgment, and may be enforced as such until reversed or set aside by some appropriate proceeding. When it is said, generally, that the jurisdiction of the court may be inquired into whenever and wherever a party seeks the benefit of a judgment rendered by it, *nothing more is meant than that it may be inquired into to the extent and in the manner allowed by the rules of evidence*, and such language is to be understood as qualified by the no less broad and well settled rule that in an action at law on such judgment the defendant *can not impeach the judgment on the ground of fraud nor the want of jurisdiction, unless they appear upon the face of the record.* Thus the power of a court of law to inquire into the jurisdiction of the court by which the judgment was rendered is fully recognized and the general language used in the books justified, but the *inquiry is limited to an inspection of the record*, and if it does not appear *affirmatively on the face of the record* that the court had no jurisdiction, *the impeachment for all the purposes of a defense to an action at law has failed.* And this is so whether it appears affirmatively upon the face of the record or not that the court had jurisdiction, for *if it does not* so appear, the *presumptions of law*, which are always in favor of the jurisdiction and of the regularity of the proceedings of courts of general

jurisdiction, proceeding according to the course of common law, *come to the aid of the record.* This rule is a branch of the doctrine of *res adjudicata*, and is founded upon the broad principle that the good order of peace and society require that there should be an end to litigation. Chemung Canal Bank v. Judson, 4 Selden, 254.

The citations made in the opinion just quoted are important.

Some of the Vermont cases go to the very point, and all go to the principle, that *in rendering a judgment a court necessarily adjudges the facts upon which its jurisdiction as to the person depends* and in two of the cases the defense of *unauthorized and unknown appearance of counsel* is made. 1 Tyler, 304; 4 Vt., third point, 65-6, and disposition thereof by the court, 68; 15 Vt., first point made by defendant, 47, and disposition thereof by the court, 50. In the last case it did not appear from the *record*—as it *does* in the case at bar—that there was jurisdiction of the person. The court *presumed*, the record being *silent*, that the jurisdiction was shown by the evidence, and this implies that in *such* case the complaining party *might* have overthrown the presumption by proof; but in the case here the record is *not* silent, but *affirmatively* shows jurisdiction of the person, and that fact being as fully established by the *record* as any other, was as certainly *adjudged* as any other, and was not open to collateral impeachment. In Texas the record would have been equally conclusive whether silent or affirmative, and that is the only difference between the rules of the two courts on that point; for it can not be doubted

that the Vermont court's presumption in favor of the record would have been *conclusive* had the record, instead of being *silent*, established jurisdiction *affirmatively*.

The Connecticut case, 30 Conn., 190, is a leading one on the whole subject of collateral assault on domestic judgments of courts of general jurisdiction, and holds the doctrine of the Texas courts. There the plea of the defendant against the judgment sued on was, that he was not served with citation, never appeared in, nor answered to, nor defended, the suit; was not an inhabitant or resident of the State of Connecticut at the time of or since the pretended services, but was during that period an inhabitant and resident of the State of New York. 191. He put his case, on argument, thus:

> A citizen of Connecticut is permitted by our courts to invalidate a judgment of a sister State against him by showing a want of notice. On every principle a citizen of another State ought to have the same privilege with regard to a judgment of a court of Connecticut. 194.

The court said:

> We do not understand that, upon the authorities *at home or abroad*, there is any contrariety of opinion, that a *domestic* judgment rendered by a court of general jurisdiction, where no want of jurisdiction is *apparent on the record*, can not be *collaterally* attacked. 197. * * * The defendant's counsel insist that *jurisdictional* facts are never *found* absolutely and conclusively by any court, whether its jurisdiction be general or special; and that to this extent any record may be attacked and disproved. We can not yield to this claim. Jurisdictional facts, *such as service of the writ and the like*, are presumed, and *conclusively* presumed, in the case of a domestic court of general jurisdiction, unless the *record itself* shows the contrary. 198.

In the Maine case (22 Me., 128) the defense to the judgment sued on was not distinguishable in particulars from that urged in the case at bar against the Brazoria judgment. The court rejected it. 129-30.

The Massachusetts case, 18 Pick., 35 Mass., 393, refuses to permit the defendant sued on a judgment of a court of that State to aver against it, that at the time of the supposed service on him of the writ in that action he was not, and that he had never been, an *inhabitant* or *resident* of that State; that he had no *notice* of the action, *did not appear* to defend it, and had *no interest* in the land therein attached.

The Ohio case, 8 Ohio, 109, sustains demurrers to pleas of *fraud* interposed by a defendant to an action of debt on a judgment rendered against him by a court of *Virginia.* The opinion is a useful discussion of the question of the conclusiveness of judgments of courts of general jurisdiction, and leans strongly to the affirmance of their conclusiveness against collateral attack, whether they be domestic or otherwise.

Baker v. Stonebraker's Adr., 34 Mo., 175–6, was an action in a *Missouri* court on a judgment of a court of record of *Maryland.* The transcript showed that the sheriff had done nothing with the citation to the defendant issued in the Maryland case, but "nevertheless, the said defendant voluntarily appears in court here by Chew Schnebley, his attorney, and thereupon the plaintiff declares, * * * and the said defendant, by his attor-

ney aforesaid, says that he can not deny the action aforesaid," and thereupon judgment was entered.

The defendants in the Missouri suit denied that Schnebley was the attorney of Stonebraker, or authorized to enter his appearance. On this point the court said:

> As to the jurisdiction of the Maryland court of the person of John Stonebraker, the question is settled beyond doubt by the well considered case of Warren & Dalton v. Lusk, 16 Mo., 102. *Not only did the appearance of the defendant by attorney give the court jurisdiction of the person* of the defendant, but the defendant will not be permitted in a suit upon a judgment *to disprove the authority of the attorney;* the *record is conclusive* upon him.

Warren & Dalton v. Lusk, 16 Mo., 102, was a strongly contested case, and valuable not only for the discussion of the question by court and counsel, but for collection of authorities as well.

The action was debt in a *Missouri* court on a judgment of an *Illinois* court against Julian H. Lusk and Edward Lusk. It appeared from the record of the Illinois court that neither of the Lusks was served with process. The record stated that the defendants demurred, and that the demurrer was signed by solicitors of the demurrants. At a subsequent day, the record recited, that "this day came the parties by their solicitors, the defendants having filed their demurrer to the complainants' bill," etc. The demurrer was overruled and leave given the complainants to amend their bill; and the bill was taken *pro confesso* against Julian H. Lusk, he failing to answer further, and the decree as to him was confirmed, and he

was adjudged to pay $3238. His co-defendant escaped. Against the action on this decree Julian H. Lusk pleaded:

That he was *never served with process* in the original suit; that he *never appeared thereto in person or by any authorized solicitor*, and that he *was not*, at the time of bringing this suit or at any time during its pendency, *a resident of the State of Illinois.*

These facts being in evidence, the defendant prevailed. The court, on appeal, 109, stated the *only* question to be—

Whether the defense offered by the defendant was admissible in an action on a judgment or decree *of a sister State*, rendered under the circumstances detailed in the foregoing statement.

* * * * * * * *

1. In the record of the case before us, the laws of the State of Illinois, giving effect to the judgment of her courts of general jurisdiction, do not appear. We know that this is a matter regulated by the course of the common law, and in the absence of the knowledge of what the law of a sister State is, on questions of common law, it is an established principle of American jurisprudence that our courts will presume that the law of such State, on such question, corresponds with our own. Holmes v. Broughton, 10 Wend., 75; Legg v. Legg, 8 Mass., 99.

2. Now if this were a *domestic* judgment, and suit was brought upon it, would it admit of question that this defense would be inadmissible?

In the case of Houghton v. O'Connell, 3 Wheat., 234, Judge Marshall says: "The judgment of a State court should have the same credit, validity and effect in *every other court of the United States* which it had in the State court where it was pronounced, and that whatever pleas would be good to a suit thereon in such State, *and none others*, could be pleaded in any court of the United States." In the case of Landes v. Perkins, 12 Mo. R., this court maintained, that a judgment could not be impeached in a collateral proceeding *by showing a want of jurisdiction of the person of the defendant;* and the same judgment coming up in a kindred case, in the Supreme Court of the United States,

that court held the same doctrine, and decided that it could not be impeached collaterally, and *expressed an entire concurrence with the views on this point entertained by this court.* Landes v. Brandt, 10 How., 371.

It will be perceived that some of the foregoing decisions protect the judgments of the courts of *other* States from collateral impugnment, by facts not distinguishable from those urged in the case at bar, just as it is everywhere conceded a *domestic* judgment should be, in like case, protected. It is not forgotten that many cases which apply the doctrine in favor of *domestic* judgments refuse to apply it to the judgments of courts of *sister States*, when such judgments are assailed for want of jurisdiction of such cases, or for want of notice to or authorized appearance for the defendant; but the cases which do not observe this distinction seem to us to be the stronger by the circumstance that they do not. For the significance of their unqualified application of the protective rule is, that the judgments of the courts of *other* States being safe from such collateral attack, *a fortiori* should be *domestic* judgments.

THIRD.

The Brazoria judgment is domestic, and, therefore, conclusive as to the Federal trial court of the district within the territorial limits of Texas, and embracing the county wherein the judgment was rendered and the county wherein lay the land in controversy.

It was asserted by the defendants in error that the Brazoria District Court is not a domestic court, nor its judgment a domestic judgment, *as to the trial court*; because the latter is a *Federal* court, and, *although sitting in Texas*, could accord to the court of *that* State no greater dignity, and, to the judgment of such court, no more conclusiveness than would be due by it (the trial court) to the court and judgment of another State in like case; and since the judgment of a court of another State would be subject in such case to such collateral assault, so was said judgment of the court of Texas. We maintain, to the contrary, that as to the Federal court sitting in Texas the Brazoria court is a domestic court and its judgment a domestic judgment—as conclusive of the jurisdictional facts appearing on the face of the record, or not affirmatively negatived by the record, against collateral attack in said Federal court as it would be in a Texas court: and, further, that whether or not the term "domestic" critically, and in every sense, defines the character of the judgment as to such Federal court, yet the judgment is unimpeachable collaterally *within the territorial limits of Texas*, whether assailed in the courts of that State *or in a Fed-*

eral court sitting and exercising jurisdiction therein, because it is *a rule of property in Texas* that by such judgment in such case the *title to land* is divested out of one of the parties to the controversy and vested in the other, and can not be disputed or put in issue save by a *direct* proceeding to annul such judgment.

Perhaps there are not many cases which, in so many words, declare that as to the Federal court sitting within the territorial limits of a State a judgment of a court of that State is a domestic judgment; but there are some that make the express declaration, and many others—as will appear in the course of this argument—that imply it in terms too strong to be doubted or withstood. We appeal to both, and, as to those of the second class, shall find support in not a few upon which our adversaries rely to maintain the ruling of the trial court.

Owens v. Gotzian, 4 Dillon, 436; 16 Am. Law. Reg., N. S., 181, holds with us even as against *strangers* to the record.

There an action was brought in the Federal Circuit Court of Minnesota to recover damages for the conversion by the defendants of certain personal property alleged to belong to a bankrupt estate of which the plaintiff was assignee. The defendants introduced in evidence the record of a judgment rendered by a court of Minnesota in an action wherein the present defendants were plaintiffs and the bankrupts were defendants, and proved that they purchased the property in question at a sheriff's sale under execution issued upon that judgment. The

plaintiff offered to prove that the service of summons in that action was made by a *silent partner of the bankrupts* and was invalid and void, by virtue of a State Statute providing that "the summons may be served by the sheriff of the county where the defendant was found, or by any other person *not a party to the action*." The testimony offered was objected to by the defendants. The court said:

Two propositions are involved in the objection:

1. Is the judgment of the State court a *foreign* or *domestic* judgment?

2. If a *domestic* judgment can the plaintiff attack it in this suit?

In nearly every instance where the judgment of a *Federal* court *sitting within the same territorial limits* has been the subject of consideration in a *State* court, it has been regarded as a *domestic* judgment. Thomson v. Lee Co., 22 Iowa, 206, and cases cited. *For obvious reasons, the judgment of a State court should be regarded as domestic by the Federal courts in the same State; both summon jurors from and their judgments operate upon and compel seizure and sale of the property of, the same citizens, and they are not, therefore, foreign to each other.*

Being a domestic judgment, it may be shown to be void *upon its face* if the court rendering it had no jurisdiction of the defendants' persons, and it is equally true that, except for errors affecting the jurisdiction of the court, its validity can not be questioned. If jurisdiction of the persons was obtained in this case in the State court, this court must regard it as conclusive of the question determined, and give it full force and effect. The *record* discloses personal service upon the defendants, yet the plaintiff urges that the service was made by one of the parties to the action, and that *such* service is not permitted, and renders the judgment a nullity *as to strangers* to the action. This proposition is not without force. If the statute prescribes the mode and manner of service of summons, and authorizes it to be made by any person except a party to the action, the question may well be asked why a judgment entered up without any appearance of

the defendants *thus* served is not beyond the authority of the court rendering it? Why should *strangers* to the judgment be prevented from establishing perhaps a prior lien, or a superior incumbrance, on showing the service of summons was by an incompetent person? The answer is, that this error in the service did not affect the jurisdiction of the court, and is only an irregularity. The actual service upon the defendants *appears in the record*, and no objection being made before judgment is rendered the defect is cured by the entry. Such undoubtedly is the rule as between parties to the suit, and it is reasonable that strangers to the record should not impeach it in a *collateral* action. The service shows a defect in obtaining jurisdiction, not a want of jurisdiction, and it is presumed the court when judgment was rendered determined the service attempted sufficient, and passed upon that question. 22 Iowa, 380; 2 Abb. Pr., 344. Again, *an inspection of the record* shows that the person who served the summons, although perhaps a silent partner of plaintiff's, was not by name a party to the suit. 181–3.

Should it be contended that, while this case certainly affirms that the State court judgment is as to the Federal court in the State "domestic," yet that in fact the decision proceeds on the assumption of the irregularity, not the absence, of service, the answer is twofold:

1. The court stands always by the facts *as reflected by the record of the State court.*

2. The *necessary* result of the determination that the State judgment is *domestic*, is, that it is not impeachable collaterally for any cause *that would not be available against it collaterally in a court of Minnesota.*

Or in other words: Had the Minnesota *record* located within the jurisdiction of the court the subject matter and the residence and citizenship of the parties—had it shown that the defendant came and demurred and an-

swered, and contested by counsel, upon argument and evidence, the issues of law and fact, and that the court on the law, and the jury on the facts, found against him; had it shown that the final judgment recited that the parties came by their attorneys, and, upon being heard, the defendant's demurrer was overruled, and thereupon the jury, after hearing evidence and argument, returned a verdict for the plaintiff, *and that he recover the subject matter of the suit*, and that following such recitals was the adjudication of the court that the plaintiff recover such subject matter of the defendant, and the latter be forever barred from having or asserting title thereto or to any part thereof, and the former be forever quieted in the title and possession thereof, *and had the law of Minnesota, whether by statute or judicial decisions, been that such a record could not be collaterally challenged in a court of that State*—then, the Federal Court *being a domestic* court, *must* have held, *agreeably to the law of Minnesota*, that the record imported absolute verity and could not be impugned, in a proceeding of that character, by evidence that there was no jurisdiction of the defendant.

The record in the case at bar is one with that supposed, and the law of Texas is that ascribed, hypothetically, to Minnesota.

In *White v. Crow*, 17 Fed. Rep., 98, Crow obtained a money judgment in a *State* court of *Colorado* against a corporation of New York, on a claim assigned to him by one Henslee, who was a stockholder of the corporation, and its duly appointed agent in Colorado to receive notice

of suits. Process in Crow's suit was served on Henslee as such agent, and four days thereafter he appeared and confessed judgment against the corporation and in Crow's favor for the amount sued for. This was in January, 1880, and in June following execution sales of the corporation's property were made under this and other like judgments. It seems that the corporation had the right, expiring with December of the same year, to redeem the property so sold, and that one White, who had acquired the corporation's property by purchase from its receiver, within the time permitted, redeemed from all the judgments but Crow's. From *that* judgment he declined to redeem—seemingly upon the theory that it was either void, or so far irregular as not to require his recognition; because the assignment by Henslee to Crow was collusive, without consideration, executed with intent to put the claim in judgment upon process served on Henslee as agent of the corporation and without the knowledge of its officers, and the judgment was entered within four days after service of process on Henslee, and by his confession, he having no authority so to act.

White filed a *bill in equity* in the *Federal* Circuit Court of *Colorado* to enjoin further proceedings under that judgment by the sheriff, Crow, and purchasers of the judgment. The bill was dismissed as to the sheriff; but the parties to whom the deed, if executed by the sheriff, would go, having voluntarily come before the court, a decree, thought by the court to be equitable, under peculiar facts not pertinent to the present discus-

sion, was entered adjusting the rights of such parties and the complainant. In the course of its opinion the court said:

> While it may be true that Henslee was without authority, and as agent of the company, appointed to receive service of process, he would not have power under the statute to confess judgment in favor of anyone and bind the company in that way, the judgment, therefore was irregular, perhaps subject to reversal, on that account; yet we do not think it is open to collateral attack. Upon a confession of judgment by a corporation *the court in which the action is pending must of necessity judge of the authority of any natural person who may appear for the company in that behalf, whether it be an attorney at law or an agent of the company, and its judgment as to the right and authority of the person so appearing to bind the corporation must be conclusive in all other proceedings where the same judgment is drawn in question.* What the force and effect of such a confession shall be *in any regular proceeding to vacate it, and in any court of review to which it may be carried, is not for us to say.* 101-2.

It is true that in this case, as in that of Landes v. Brant, 10 How., 348, already stated and hereinafter discussed, it is not textually affirmed that the court received the State court's judgment as conclusive, against collateral question, of Henslee's authority to confess judgment, *because* that judgment was *domestic*; but the *fact* was that the two courts exercised jurisdiction in the same State, and were as to each other domestic courts—if, indeed, that be not an *impossible* relation for State and Federal courts to bear to one another.

Walker v. Cronkrite, 40 Fed. Rep., 133, was an action of ejectment in the *Federal* Circuit Court of *Kansas* to recover land, of which the plaintiff, Walker, alleged

himself to be the owner and in possession. The defendants claimed the land under a judgment theretofore rendered by a *State* court of *Kansas* in a suit between the same parties—the plaintiff in the pending action being defendant in that suit, duly served with process therein, and bound thereby. The *record* in the former suit disclosed that Walker was duly served with process therein. By replication, he *denied that he was ever served with process in that suit, or had any place of residence in Kansas; and alleged that he had no notice of the suit until after the judgment therein was rendered.* To this replication the defendant filed a demurrer, *which the court sustained. Inter alia*, the court said:

It is an elemental rule of law that a personal judgment, rendered without jurisdiction of the person, is void, and it has been held that in an action on a *foreign* judgment the defendant may deny jurisdiction of the court over the person, although such defense impeached the truth of the record. D'Arcy v. Ketchum, 11 How., 165; Amsbaugh v. Bank, 33 Kan., 101; 5 Pac. Rep., 584; Borden v. Fitch, 15 Johns., 139; Crepps v. Durden, 1 Smith Lead. Cas., 844 The question at issue here is quite a different one. *Here is the record of a domestic* judgment, showing service of summons on the defendant. Under that judgment, and in pursuance of its decree, *real estate has been sold under the forms of law, and title passed through several parties, relying on the verity of the record, and the adjudication of a court of general jurisdiction.* Can it be that the defendant to *such* a record may treat it as an absolute nullity, and *falsify it by extrinsic* evidence, when it is invoked by the purchaser in a *collateral* proceeding in defense of his *title?* If so, the stability of *title to realty*, based on judicial sales, has but little foundation to rest upon. My attention has been called by defendant's counsel to many cases holding that this record can not be thus contradicted. Ferguson v. Crawford, 70 N. Y., 253; Grignon's Lessee v. Astor, 2 How., 319; Crepps

v. Durden, 1 Smith Lead. Cas., 823, 824, and authorities cited. Also a late case (May 16, 1889) in the Court of Appeals of Kentucky (Thomas v. Ireland, 11 S. W. Rep., 653), is very much in point. 135.

The court added that there was "some force of reason" in the further contention of the defendants that the judgment in the first suit was, as to Walker, *in rem*, and proceeded thus:

But supposing it is true, as claimed by plaintiff, that he may contradict this record by extrinsic evidence in a collateral proceeding, what logical reason can be given why the Legislature of the State can not say, in the interest of repose of titles, that his right to do so shall be limited to five years after recording the deed on a sale made under the judgment? If the *record* was *silent or showed on its face* a want of jurisdiction, the argument of plaintiff's counsel against the application of the statute would have greater force. 135.

Quoting then the limitation statute of the State, the court says:

In my opinion this case comes clearly within the terms and intent of this statute. The *record* shows jurisdiction of the person and subject matter. The sale was made according to law, and the sheriff's deed was made and recorded more than ten years before this suit was commenced, and the execution debtor now comes too late to question its validity.

First National Bank of Danville v. Cunningham, 48 Fed. Rep., 510, although the case of collateral attack, *in the Federal Circuit Court of Kentucky*, on a judgment of a *State* court of *Illinois*, yet, for reasons hereinafter indicated, seems to us peculiarly apposite to our contention, that the question of the liability to or exemption from

collateral attack of a judgment of a State court in a *Federal* court of *that* State is to be answered by determining whether such judgment is liable to or exempt from such attack *in the courts of that State.*

It is not and can not be disputed that the Brazoria judgment is proof to collateral attack in any court in *Texas.*

In the case cited, the State judgment was rendered in a suit on notes, containing a warrant of attorney to confess judgment thereon; and it was on demurrer to the answer to the petition of the plaintiff seeking recovery on the judgment that the question arose.

The petition alleged that the State court, in the action which resulted in the judgment, had jurisdiction of the subject matter; that the defendant thereto appeared therein, by counsel by him thereunto authorized, and filed his *cognovit*, confessing that the plaintiff had been damnified as alleged by him; and the court thereupon entered the judgment, which was still of record in said court, and in full force. A transcript of the record in that action was made part of the plaintiff's petition. By amended petition, the plaintiff averred that afterwards, and at the same term of the court, the defendant by authorized counsel moved the court to vacate the judgment —averring, in effect, that prior to the entry thereof the notes on which it was rendered had been paid—but later, and with leave of court, withdrew his motion.

The defendant's answer alleged that the said notes were discharged by an agreement of accord and satisfac-

tion between the parties prior to the judgment; that the plaintiff and his attorney, knowing this, concealed from the defendant the fact that any action was to be brought on the notes, and concealed from the State court, and from the attorney procured by them to appear for the defendant and confess the judgment, the fact that the notes were discharged; that the defendant was not served with process in that action, and had no knowledge of it until after the final adjournment of the court; that the entry of his appearance and confession of judgment in his name were unauthorized and fraudulent, and procured by the plaintiff and his attorney for the purpose of preventing defense to the action.

The court overruled the demurrer.

In the course of the discussion, the court said:

It is settled law, under the constitutional provision, that full faith and credit shall be given in each State to public acts, records and judicial proceedings of any other State, and the act of Congress passed in pursuance thereof, that plaintiff's judgment should have the same credit, validity and effect *in any other* court within the United States *which it has in the State of Illinois, where it was rendered*, and that whatever pleas would be good to a suit therein in *that* State, and *none other*, can be pleaded in defense to a suit thereon in *any other* court within the United States. Hampton v. McConnel, 3 Wheat., 234; McElmoyle v. Cohen, 13 Pet., 312–326; Embry v. Palmer, 107 U. S., 10; 2 Sup. St. Rt., 25.

It is also well settled that, in an action brought in any court on a judgment of a court of *another* State, the jurisdiction of the court to render the judgment may be assailed or attacked collaterally by proof that the defendant was not served and did not appear in the suit; or, where an appearance was by an attorney, that the appearance was unauthorized; and this, even where the proof directly contradicts the record. In other words, all

facts necessary to give the court rendering the judgment sued on jurisdiction, either as to the subject matter or the person, may be contradicted. Shelton v. Tiffin, 6 How., 163; Thompson v. Whitman, 18 Wall., 457; Knowles v. Gas Light, etc., Co., 19 Wall., 58; Starbuck v. Murray, 5 Wend., 148; Shumway v. Stillman, 6 Wend., 447; Kerr v. Kerr, 41 N. Y., 272; Ferguson v. Crawford, 70 N. Y., 257; Gilman v. Gilman, 126 Mass., 26; Wright v. Andrews, 130 Mass., 149. 514.

And, after repeating the substance of the answer:

These facts, if true, establish not only a want of jurisdiction over the defendant, but a fraudulent attempt to acquire the same; for it admits of no question that the warrants of attorney attached to the several notes sued on in the Illinois court were only made to secure the payment of such notes; that they were "irrevocable" only while the notes remained unpaid; and that, upon the payment and discharge of said notes, the authority conferred by said warrants of attorney thereby ceased and terminated, both in fact and law, especially as against a holder of the notes who knew the fact that such notes were satisfied and discharged. No other construction can properly be placed upon said warrants of attorney, which in dispensing with notice and all opportunity to be heard by the makers thereof, the courts treat with little favor—interpret strictly—and require to be followed to the letter of the powers conferred. Thus in Reid v. Southworth, 71 Wis., 288, 36 N. W. Rep., 866, it was held that a warrant of attorney (substantially like the present) to confess judgment for the amount unpaid on a note authorizes confession of judgment only for the amount actually due on such note. *But, without dwelling upon this aspect of the case, it is perfectly clear that the answer presents a defense that would be good to a suit on the judgment, not only in Illinois, where it was rendered, but in Kentucky, where it is sued upon.* Williams v. Preston, 3 J. J. Marsh., 608; Lawrence v. Jarvis, 32 Ill., 304; Rea v. Forrest, 88 Ill., 276. In this last case it was held by the Supreme Court of Illinois:

"That where the payee of a note has been paid, if he afterwards takes judgment thereon, under a power of attorney attached thereto, without the knowledge or consent of the maker,

it will be fraudulent and void, and that he can not enforce its payment in a court or by a suit on such judgment."

Section 66c, 110, of the Illinois statute, which authorizes the confession of a judgment in such cases, is as follows:

"Any person, for a debt *bona fide* due, may confess judgment by himself or by attorney, duly authorized, either in term time or vacation, without process."

Tested by the foregoing principles and authorities, considered in connection with the cases of Spence v. Emerine, 46 Ohio St., 433, 21 N. E. Rep., 866, and Sewing Machine Co. v. Radcliffe, 137 U. S., 287–299, 11 Sup. Ct. Rep., 92, which intimate a grave doubt whether a judgment obtained as plaintiff's was can have any validity *in another State than that in which rendered*, we entertain no doubt that the defendant's answer sets up a good defense to the judgment as presented in the original petition. 515–6.

Robertson v. Pickrell, 109 U. S., 610–11:

The act of Congress declaring the effect to be given in any court within the United States to the records and judicial proceedings of the several States, does not require that they shall have any *greater* force and efficacy in *other* courts than in the courts *of the State from which they are taken, but only such faith and credit as by law or usage they have there.*

United States v. Gayle, 45 Fed. Rep., 107, was an action in the Federal Circuit Court of South Carolina on a judgment for money theretofore rendered in *that* court. The defendant denied that she was ever served with the writ in that action, or that she had any notice whatever of the action. The *record* showed, indorsed on the writ, the marshal's affidavit that he served the defendant personally. The court said:

There is excellent authority for the position that the return is conclusive as to the parties to the action. Murfree on Sher., § 868, and cases quoted in note 2, Crok. on Sher., § 44, p. 30.

But, deciding this question as a matter of fact, the contemporaneous entry made by the deputy marshal *of an occurrence eighteen years ago* prevails with me over the recollection of the defendant. I am of the opinion that she was properly in court. The order for judgment filed 3d August, 1872, recites: "This writ herein having been personally served on the defendant, and no appearance having been entered," etc. This being so, and the action being on a *domestic* judgment, her defense can not avail her.

When it appears upon the record that the court had jurisdiction of the person of the defendant, *it can not be controverted.* Westerwelt v. Lewis, 2 McLean, 514. It is a maxim in law that there can be no averment in pleading against the validity of the record, though there may be against its operation. Therefore no matter can be pleaded which existed anterior to the recovery of the judgment, and the original defendant *can not plead that the judgment was obtained against him by fraud.* 2 Saund. Pl. and Ev., 255; Freem. on Judgm., §§ 131–133, 150.

In Cook v. Darling, 18 Pick., 393, in an action of debt on judgment, defendant pleaded that at the time of the commencement of the action he was not and never had been an inhabitant of the Commonwealth, that he was not in the county in which it was said that he had been served, and that he had no notice of the action. Plaintiff demurred. The court say: "The judgment declared on is a *domestic* judgment of a court of common law jurisdiction, to which writ of error lies to reverse the judgment if erroneous; but, until reversed, it is conclusive. Demurrer sustained."

In Richards v. Skiff, 8 Ohio St., 586, an offer being made to prove that the defendant at the time of entering judgment was but two years old, and that no service of process had been made on him, the court said: "The *record* in this case is not silent. It recites that due notice had been given. *This is a finding of the court*, and, being shown by a record importing absolute verity, can not be contradicted." See also Walker v. Cronkite, 40 Fed. Rep., 134; Turner v. Malone, 24 S. C., 403. * * * *

In this proceeding, judgment must be for plaintiff. If the defendant wishes to secure her rights, she must attack the original judgment in some *direct* proceeding. Freem. on Judgm., § 134. 107-8.

Terrel v. Warren, 25 Minn., 9, was an action in a State court of *Minnesota* to determine the adverse claims of the defendants to a lot of land in the city of St. Paul, alleged to be in the plaintiff's possession. One of the defendants, Harbert, alleged title in himself and wrongful eviction by the plaintiff. The court found as facts that on March 18, 1859, the McClouds owned the lot and mortgaged it to Lash, and in August following again mortgaged it to the defendant Warren, both mortgages being recorded. In October of the same year, the McClouds conveyed the lot to Harbert by deed duly recorded. In July, 1860, Lash sued *in the Federal Court of Minnesota* to foreclose his mortgage against the McClouds, Harbert and Warren, describing himself as a citizen of North Carolina, the McClouds as citizens of Minnesota, Harbert, a third (John) McCloud, and Dumas as citizens of Pennsylvania. The bill was taken as confessed, and under decree foreclosing the mortgage the lot was sold to Lash, in June, 1861, and the sale confirmed by the court. No redemption having been made, the master conveyed the lot to Lash by deed, which was duly recorded, in January, 1865.

At the date of the mortgage to Lash by the McClouds, the latter were resident citizens of Minnesota, but in 1866 one of them, and in 1871 the other, changed their residence and citizenship to Wisconsin. At and ever after the execution of the mortgage to him, Lash was a resident citizen of North Carolina, Warren of New York, and Harbert of Pennsylvania. On these findings the court

entered judgment against all of the defendants, and the Supreme Court of Minnesota, on appeal, affirmed the judgment.

At the trial the defendants offered to show, "by competent evidence," that in the suit in the Federal court Harbert *was never served with process, never appeared in the suit, and never knew of its pendency;* also, that the *record* of that suit did not show any service of process on or appearance by either Harbert or Warren, *except such as might be inferred from the court's order taking the bill as confessed and entering final decree.*

To these offers the plaintiff successfully objected as incompetent, irrelevant and immaterial, and to the *first*, for the additional reason that *it contradicted the record of the decree and proceedings in the Federal court.*

The order that the bill be taken *pro confesso did not recite or state the service of any process, but merely recited the failure of the defendants to demur, plead or answer;* nor did the *decree* contain any such statement or recitation, the only recitation being: "This day this cause came on to be heard at this term, on the bill and the master's report herein, and was submitted by counsel, the defendants being in default."

It was insisted on appeal:

1. That since it appeared from the bill in the Federal court that Warren and Harbert were citizens of States other than Minnesota, jurisdiction of them could have been acquired *only by service of process on them in that State, or by their voluntary appearance.* 1 U. S. St. at

Large, 79, sec. 11; and that the jurisdiction of the court thus limited, no presumption existed in its favor, but *every necessary jurisdictional* fact should *affirmatively* appear on the record.

2. That the appellants *were not concluded by the record* from showing, *as a matter of fact*, that they were neither *served with process* nor *appeared*, and that *therefore* the court never acquired jurisdiction of them.

3. That there was no jurisdiction of the subject matter, and the proceedings were void; because Lash, Warren and Harbert were the only parties interested in the land, and it was essential, under the judiciary act, that one of the three should be a citizen of Minnesota.

4. That the record did not show that Harbert and Warren were included in the order for taking the bill *pro confesso*, or in the decree.

5. That Harbert, the owner of the equity of redemption, *not having had his day in court*, the proceedings were a nullity.

The Supreme Court said:

Conceding that the answer of defendant Harbert disclosed an adverse claim, estate or interest in land, proper for determination under the statute, the record before us *fairly presents the question whether the judgment which was received in evidence against him was open to attack by parol proof, showing that the court in which it was rendered never in fact acquired any jurisdiction over his person, by service of process or otherwise, he being at the time a resident and citizen of Pennsylvania, and absent from its jurisdiction.* That court was the Circuit Court of the United States holden *in and for the district of Minnesota—a district territorially identical with the State.* The cause of action upon which the judgment was

rendered was one confessedly within the jurisdiction of the court, *under the allegations in the bill of complaint in respect to the citizenship and residence of the parties.* Though limited in the extent of its jurisdiction, in respect to the causes of action and subjects of which it may take cognizance, within such limits it possesses the same general authority that belonged to superior courts of record at common law, and its judgments and proceedings are entitled to receive the like favorable presumptions and intendments for their support. In no just sense can it be regarded as a *foreign* tribunal, *or as holding the same relation to the government of this State as is held by the courts of a sister* State. It derives its authority from *a common national* government, whose constitution is alike obligatory upon it and our own courts, as the supreme law in respect to all matters coming within the scope of its provisions. In the determination of all questions properly brought before it for adjudication, it must *take cognizance and have reference to the same laws, State and Federal, that are binding upon the State courts in the disposition of like questions presented for their decision.* Its judgments rendered in this district are operative throughout the State, and may be enforced by execution anywhere within its boundaries. Every suitor therein, feeling aggrieved by any of its decisions or judgments, may, without subjecting himself to a *foreign* jurisdiction, obtain relief therefrom, if erroneous, *as fully as in the State* courts, by a *direct* application to *the court itself*, or by a *review on error or appeal.* No good reason occurs why its judgments ought not to be placed on the same footing with the *domestic* judgments of superior courts of record of *our own State, and treated accordingly; and such is undoubtedly the true rule.* Thompson v. Lee County, 22 Iowa, 206; 2 Am. Lead. Cas., 619; Hughes v. Davis, 8 Md., 271; Town of St. Albans v. Bush, 4 Vt., 58; Earl v. Raymond, 4 McLean, 233.

In respect to *this* class of *domestic* judgments, whenever their validity is sought to be impeached in any *collateral* proceeding, *the better rule*, in our opinion, *requires jurisdiction to be conclusively presumed*, unless the contrary *affirmatively appears upon the face of the record itself.* Hahn v. Kelly, 34 Calif., 391; Crot v. Havin, 30 Conn., 190. This accords with the decisions of this court in Kipp v. Fullerton, 4 Minn., 366 (473), and State v. Macdonald, 24 Minn., 48, and we feel no hesitation in adopting it as *res adju-*

dicata in this State, whatever may be the tendency of the decisions in some other tribunals.

This being the case, defendant's offer was properly excluded, for not only did the judgment fail to disclose any want of jurisdiction over the person of the defendant, but the offer itself conceded that the record was silent upon that subject. 13-15.

Barney v. Patterson, 6 Harris & Johnson, 182, was an appeal from the judgment of the Baltimore County Court of *Maryland*, in an action of ejectment brought by Patterson's lessee, the appellee, against Barney, the appellant. The appellee claimed title under an execution sale made by the United States marshal of the *Federal Circuit Court of the State named*, by virtue of a judgment of condemnation by that court of the premises in question on proceeding in attachment, in a suit by the United States against one Brown, the then owner of the premises. The appellant's counsel insisted that the great question was, how far the proceedings in the Circuit Court were examinable in the State court. His contention was, that the judgment was, as to the State court, the judgment of a *foreign* court. 193. After some discussion, predicated upon the assumption of the soundness of the contention that the Federal court judgment was, as to the State court, foreign, the court proceeds:

But under the peculiar structure of our political system, it should *not* be treated as a foreign judgment. The Constitution and laws of the United States are the supreme law of this State; *the laws of this State furnish rules of decision for the Circuit Court*, and causes commenced in the State court may be removed for trial into the Circuit Court. The citizens of the State are returned and serve as jurors in that court, and are amenable to its pro-

cess; and their property, real and personal, is liable to seizure and sale by the marshal of the district, under executions issued upon the judgments of that court, with other attributes of a *domestic* court, belonging to that tribunal, which place it on a ground very different from that of a *foreign* court. 203.

The following review is believed to embrace all Federal cases, not already considered, which were used or cited by our adversaries in the trial court or in the Circuit Court of Appeals to the general contention that the record in the Brazoria case was open to contradiction by matter *aliunde*. It comprehends, as well, other cases, both prior and subsequent to those, that are quite as much to the point; for since the question made is of the last importance, we do not shrink from the exposition of all the cases known to us which are characterized by like reasoning and results. We deny that any of them warrant the contradiction *aliunde* of the Brazoria record.

And at the outset, we remark, that critical analysis will disclose that they are cases (1) of *direct* attack on *domestic* judgments; or (2) of *collateral* attack on *foreign* judgments, or judgments of States *other than that wherein*

their conclusiveness is put at issue; or (3) of *collateral* attack on *domestic* judgments *in personam* wherein *the records affirmatively show* that the *nonresident* defendant has been cited only by *publication*, or other *constructive* process; or (4) of *collateral* attack on *foreign* or *sister State* judgments for want of jurisdiction of the *subject matter*.

Thompson v. Whitman, 18 Wall., 457, deserves, for many reasons, especial consideration, and will be frequently referred to in this discussion as "the principal case." It was substantially thus: The oyster law of New Jersey inhibited the taking, by any nonresident, of any shell fish from the waters of that State, on board of any vessel; and denounced a money penalty against every person violating the inhibition, and a forfeiture of the vessel, its furniture and apparel, together with the fish and the implements used in taking them. The sheriffs were enjoined to seize the offending vessel and give information thereof to two justices of the peace of the county where the seizure was made, and these officers were required to hear and determine the complaint, and in the event of condemnation of the vessel, to order it sold, etc.

The law being so, Whitman, a citizen of New York, sued Thompson, sheriff of Monmouth County, New Jersey, in the United States Circuit Court for the Southern District of New York, for taking and carrying away his vessel, the sloop Anna Whitmon, her cargo, apparel and furniture. The trespass was alleged to have been

committed on the high seas in the vicinity of the Narrows of the port of New York, and within said southern district. The defendant pleaded not guilty, and specially, that the seizure was made by him, as sheriff, in the waters of New Jersey, in said county of Monmouth, where the plaintiff, a resident of New York, was, at the time of the seizure, taking shell fish with said vessel, in violation of said law, and that by virtue of the law the defendant informed against the vessel before two justices of the peace of said county, by whom it was condemned and ordered to be sold. The plaintiff by replication denied that the seizure was made in the county of Monmouth or in the State of New Jersey, thus challenging both the jurisdiction of the justices and the right of the defendant to make the seizure. Upon this point there was conflicting testimony, but the defendant produced, as conclusive both as to the jurisdiction of the court and the merits of the case, a record of the proceedings before the New Jersey justices, wherein it appeared that the offense was committed and the seizure made in Monmouth County, and requested that the jury be instructed that said record was a bar to the action. The defendant contended that his request was authorized by section 1, article 4, of the Federal Constitution, requiring full faith and credit to be given in each State to the judicial proceedings of every other State, and by the act of Congress of May 26, 1790, requiring such faith and credit to be given in every court of the United States to the authenticated judicial records and proceedings of the courts

of any State as they have by law or usage in the courts of such State.

The court refused the instruction, and charged that the record was only *prima facie* evidence of the facts therein stated, and imposed on the plaintiff the burden of proving that the facts were otherwise. The defendant excepted, and the plaintiff had verdict and judgment.

There were special findings, that the seizure was made in New Jersey, *but not in Monmouth County*, and that the plaintiff was not, on the day of the seizure, taking shell fish in that county.

In the very first sentences of its opinion, the Supreme Court, on the defendant's writ of error, defines the issue thus:

> The main question in the cause is whether the record produced by the defendant was *conclusive* of the *jurisdictional* facts therein contained. It states, with due particularity, sufficient facts to give the justice *jurisdiction* under the law of New Jersey. Could that statement be questioned collaterally in another action brought *in another State?* 460.

And after discussion is exhausted, the *case* decided and the *decision* of *that* case are stated thus:

> On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any State may be questioned in a collateral proceeding in *another* State, notwithstanding the provision of the fourth article of the Constitution and the law of 1790, and notwithstanding the statements contained in the record of the judgment itself. 469.

And it is pertinent to observe in this connection, that the quoted language excludes such interpretation as

would ascribe to a Federal court exercising its jurisdiction in a State any other or further power of denying the conclusiveness of judgments of general jurisdiction than is possessed by the courts of such State. Neither the Constitution nor the act of Congress measures the dignity of judgments rendered in a State when challenged in courts exercising jurisdiction in *that* State—*whether such courts be State or Federal.* The purpose of the Constitution and law was to define the force in each State and in every court within the United States of the judicial proceedings of every *other* State. The thing enforced upon every court in the United States, *whether State or Federal*, is consideration for the judicial proceedings of courts of States *other than that wherein such proceedings are the subject of examination*. It is tacitly assumed that the law or usage of each State will mark the degree and limit of conclusiveness of judgments of the courts of *that* State, *or of Federal courts exercising jurisdiction therein*, when such judgments are challenged in the courts of *such* State, *or in Federal courts exercising jurisdiction therein*. The opinion clearly uses the terms "*another* State" in a sense that does not include *the* State wherein the judicial proceedings of such other State are the subject of consideration—whether such consideration be had in the courts of *the* State or in Federal courts exercising jurisdiction therein. And it is quite plain, that if the judgment of a State court of general jurisdiction is not, as to a Federal court whose territorial limits are embraced within the boundaries of such State, a *domestic*

judgment, there is not and can not be as to such Federal court such a judgment.

Yet, that there is not, as to the Federal courts, such a thing as a State judgment that is *domestic*, as contradistinguished from a *foreign* judgment or a judgment of a State *other than that of the jurisdiction*, or that Federal courts do not recognize and enforce the distinction between domestic and other judgments, are obviously inadmissible propositions. For, in considering the conclusiveness *vel non* of the judgment of a court of *New Jersey* assailed collaterally *in a Federal court in New York*, and after adjudging against the conclusiveness in *such* court of *such* judgment, the Supreme Court said:

> The records of the *domestic* tribunals of England and some of the States, it is true, are held to import absolute verity, as well in relation to jurisdictional as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, *as we have seen*, that rule has no *extraterritorial* force. 468.

Nor less is the significance, on this point, of the court's references, for example:

> Thus, in Christmas v. Russell, 5 Wall., 290, where the court decided that fraud in obtaining a judgment in *another* State is (not?) a good ground of defense to an action on the judgment, it was distinctly stated (p. 305) in the opinion that *such* judgments are open to inquiry as to the jurisdiction of the court, and notice to the defendant. 467.

The case cited was that of an attack on a judgment of a court of *Kentucky* in the *Circuit Court of the United*

States for the Eastern District of Mississippi, wherein an action of debt on the judgment was being tried. One plea alleged that the judgment was fraudulently procured by the plaintiff, and to this the trial court sustained a general demurrer.

Affirming a judgment for the plaintiff—and thereby declaring that fraud was *not* a defense to the action—the Supreme Court, *inter alia*, said:

> Cases may be found in which it is held that the judgment of a State court, when introduced as evidence in the *tribunals of another State*, are to be regarded in all respects as *domestic* judgments. On the other hand, another class of cases might be cited in which it is held that such judgments *in the courts of another State* are *foreign* judgments, and that as such the judgment is open to every inquiry to which other *foreign* judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not *foreign* judgments under the Constitution and laws of Congress in any proper sense, because they "shall have such faith and credit given to them in every other court within the United States as they have by law or usage in the courts of the State from whence" they were taken; nor are they *domestic* judgments in every sense, because they are not the proper foundation of final process, except in the State where they were rendered. Besides, they are open to inquiry as the jurisdiction of the court and notice to the defendant; but *in all other* respects they have the same faith and credit as *domestic* judgments.
>
> Subject to those qualifications, the judgment of a State is conclusive *in the courts of all other States* whenever the same matter it brought in controversy. Established rule is, that so long as the judgment remains in force it is of itself conclusive of the right of the plaintiff to the thing adjudged in his favor. 305.

The question before the court was—not the effect of the judgment of a State court *in the court of another*

State, but—the effect of a judgment of a State court in a *Federal* court *exercising jurisdiction in the territorial limits of such other State.* The effect of *such* judgment in *such* court was determined by ascertaining what it would be *in a court of such other State.* In other words, the *necessary* meaning of the court's language is that *for the purpose of its inquiry*, the United States Circuit Court for the Eastern District of Mississippi was a "tribunal," or "court" *of that State.* Or, again: A Federal court sitting in Mississippi, declared that it could inquire into the jurisdiction of a State court of Kentucky to render a judgment, *because* such judgment was not *domestic.* How not domestic, if it be true that in the Federal court of Mississippi the Kentucky judgment had the same and no further conclusiveness than a judgment of a court of Mississippi would have had? How not domestic, if the judgment of the court of *no* State could fall within that definition and maintain, in the Federal court, the dignity imported by it? If in the Federal court of Mississippi the judgment of *any* State court could be entitled to the name and potency of a domestic judgment, would it not be the judgment of a court of Mississippi? Surely, if there be *any* judgment of a State court which as to a Federal court in a State is *domestic*, it must be the judgment of *a court of such State;* and if there be *no* judgment of a State court which *as to a Federal court in a State is domestic*, the constantly repeated discussions by the Federal courts of the distinctive properties of domestic

and other judgments are as idle and barren as the metaphysical disquisitions of the schoolmen.

Elsewhere the court, in the principal case, criticises *Landes v. Brent*, 10 How., 348, *supra*, in so far as it declares that the judgment there could not be attacked in a collateral proceeding. It may be that the court in that case, in making the declaration objected to, ignored, consciously or unconsciously, any distinction, as to verity and conclusiveness, between the judicial records of American courts of general jurisdiction; and if so, it was in harmony with numerous and illustrious precedents. But, however the fact may have been, it would seem to be indisputable that the declaration formulated the rule applicable to *the* case before the court, *if* the judgment there assailed was, as to the court, *domestic*. It was a judgment rendered in 1808, in the General Court of the Territory of Louisiana, in St. Louis, Mo.—called elsewhere "the District Court at St. Louis."

The court wherein the judgment was challenged, and to which writ of error issued from the Supreme Court, was the United States Circuit Court for the District of Missouri, sitting at St. Louis. The Supreme Court, after sustaining the judgment upon the general proposition that it was proof against any but direct impeachment, added:

Furthermore: This suit in ejectment is collateral to the judgment; and it can not be impeached collaterally. So the Supreme Court of Missouri held in 1848, in the case of Landes v. Perkins, 12 Mo. R., 254, on the same title, and similar record in all re-

spects to that before us, and with the views on this point there expressed we entirely concur. 371.

Whether or not the court intended to *decide* in the terms of its general proposition, it is clear that, *in* deciding, it *in fact* supplemented that proposition by the force of a judgment of a State court *of jurisdiction of the territory wherein the assailed judgment was rendered, and wherein the Federal trial court exercised jurisdiction.* Or, to vary the statement, the judgment was accepted—not in terms, it is true, but in fact—as "domestic;" *and so, too, was judgment of the Supreme Court of Missouri,* which had ruled "a similar record in all respects" to be unimpeachable collaterally.

If this be, as it is believed to be, a clearly admissible interpretation of the court's language, the criticism of it in the principal case is not apposite; for not only does the court in the latter case confines itself to asserting the right of collateral impeachment of judgments *not* domestic—the judgment there having been rendered in a State *other than that wherein it was attacked*—but it concedes that, to *such* judgment, no prior decision rendered by it had affirmed the competency of contradictory evidence:

But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to facts stated to have been passed upon by the court. 468.

Cases are referred to by the court, 464–6, as having, in effect, overruled the "remark of the court" in *Landes*

v. Brant, that the judgment before it could not be attacked collaterally. None of these cases name that of Landes v. Brant, and none are to the point here.

The opinions in that case and in *D'Arcy v. Ketchum*, 11 How., 172, were delivered by the same justice, and in the case last named the action was in the United States Circuit Court for the District of *Louisiana* on a judgment of a State court of *New York*, for money. One of the defendants, D'Arcy, who was a resident citizen of *Louisiana*, *was never served with process*. His codefendant and partner, Gossip, was served with process, and pleaded, but suffered judgment by default, and this, *under a statute of New York*, authorized judgment thereupon rendered jointly against *both*. The theory of the plaintiff in the action on the judgment, and of the court in overruling D'Arcy's exception thereto, was the simple one that the judgment, *being valid in New York*, was *conclusive* in *Louisiana*—not because D'Arcy had been served, or appeared by the record to have been served, with process, or appeared in any way (for there was no claim or pretense of either) but *solely by virtue of the law of New York*.

Webster v. Reed, 11 How., 437, was on writ of error to the Supreme Court of Iowa. It questioned the rulings of the trial court on many points—one being the admission in evidence, over the defendant's objection, of certain judgments and proceedings thereunder to sustain the plaintiff's title to land. It would seem that a court of Lee County, Iowa Territory, was the forum in which the

judgments were obtained, and in which they were subsequently put in evidence.

By a treaty between the United States with the Sac and Fox Indians, a tract of land between the Des Moines and Mississippi rivers was reserved for the use of the "half-breeds" of those tribes. By subsequent act of Congress all the right, title and interest which might accrue or revert to the United States to this land was relinquished by them to said half-breeds. By an act of the Territorial Legislature, of January 16, 1838—enacted for the purpose of effecting "settlement" of the land, the determination of the validity of the titles of claimants thereof, the partition of the land among the claimants, or sale thereof for their benefit—it was provided, that all persons claiming any interest in the land should file, within a year, with the clerk of the District Court of Lee County, a written notice of such claim. Johnson, Wilson and Brigham were appointed commissioners, at a compensation of $6 per day, to take testimony as to the validity of all claims. This act and one supplemental to it were repealed by the act of January 25, 1839, whereby it was provided that said commissioners should commence actions in Lee County Court for their several accounts, including all expenses incurred in discharging their duties, against the owners of land, and *give to them eight weeks notice thereof in a named newspaper;* that the *judge* of said court, in the event such accounts were deemed by him to be correct, should give judgment for the amount and costs, against such owners, to be a lien on the land;

that "Owners of the half-breed lands lying in Lee County" *should be a sufficient designation of the defendants in such actions;* that the actions should be tried "*before the court, and not a jury,*" and that the act should be construed liberally to effect its intention.

Two of the commissioners, Johnson and Brigham, in actions of debt on their "accounts," recovered separate judgments in the Lee County Court "against owners of the half-breed lands lying in Lee County, I. T." The transcript of each judgment showed that the *auditor, appointed by the court to examine, adjust and allow the accounts,* came and reported a certain sum due from "*said defendants*" to the plaintiff; that the report was "*accepted*" by the court, *and judgment thereupon entered that the plaintiff recover of the defendants accordingly.*

It was these judgments, and executions, sale and deeds thereunder, by which the court, in subsequently trying the land suit of the plaintiff Reid against the defendant Webster, permitted the plaintiff to prove his title, over the objection of the defendant, that the judgments were rendered *without jurisdiction.* The judgments, executions, etc., being in, the court refused the defendant's offer to prove (a) that they were procured by the fraud of plaintiff and others, and that the plaintiff's title was founded on fraud and fiction; (b) that the defendant had title by deeds and possession; (c) that no service had been made on any person in the suits in which the judgments were rendered; (d) that no notice of the suits was given by publication; (e) that the plaintiff was the coun-

sel who procured the judgments—which were upon fictitious demands never proved before the auditor; (f) that the defendant and the owners of the land were prevented from appearing and defending by the plaintiff's fraudulent representations; (g) that the sale was in fact never made by the sheriff, and his returns were fraudulent and false.

The Supreme Court justly characterized the entire procedure resulting in the judgments and the sale and deed to the plaintiff thereunder as "extraordinary."

Reversing the judgment below, it held in effect:

That the law authorizing the judgments was void, in that by its prohibition of trial by jury it contravened the seventh constitutional amendment.

That if jurisdiction *could* be exercised under the law, it was essential to show that all its requisites had been substantially observed *and for the plaintiff to prove notice; and* therefore there was error in refusing the defendant's offer to show that "*no notice was given by publication, as the act requires.*"

That the defendant's offered evidence of title by deeds and possession, should not have been excluded.

That the suits were not *in rem* against the land, but were *in personam* against its owners; that *there was no personal notice*, nor attachment against the land, and therefore the judgments were nullities—since "no person is required to answer in a suit on whom *process has not been served* or whose property has not been attached."

That there was error in refusing defendant's offer to prove fraud in the judgments, executions, sale and deed. And that—

When a judgment is brought collaterally before the court as evidence, it may be shown to be void *upon its face* by a want of notice to the person against whom judgment was entered, or for fraud. 460.

"For the above *reasons*" the Supreme Court reversed the judgment.

It is clear that had the questions of notice and fraud been eliminated from the record, there were other fatal objections to the judgment below. And in so far as the question of *fraud* is concerned, it must be supposed that the court's remarks were made with reference to the peculiar features of the very case before it, and not intended as the announcement of a general rule; for it seems to be well ruled that fraud can not be availed of in defense to an action on a judgment of a court of general jurisdiction—and especially if the court be *domestic*—where the record of that court shows that the objecting party was served with process or appeared.

Christmas v. Russell, 5 Wall., 306–7, citing, *inter alia*, Benton v. Burgot, 10 Searg. & R., 240; Granger v. Clark, 22 Maine, 130; Anderson v. Anderson, 8 Ohio, 108; B. & W. Railroad v. Sparhawk, 1 Allen, 448; Homer v. Fish, 1 Pick., 435; Atkinson v. Allen, 12 Vt., 624; Hammond v. Wilder, 23 Vt., 346; Williams v. Haynes, 77 Texas, 284—distinguishing Glass v. Smith, 66 Texas,

549, and citing Murchison v. White, 54 Texas, 78, and other cases.

Carpenter v. City of Oakland, 30 Calif., 439; Hahn v. Kelly, 34 Id., 402; Smith v. Smith, 22 Iowa, 516; People v. Downing, 4 Sandf., 189; Richards v. Skiff, 8 Ohio St., 586; Peel v. January, 35 Ark., 331, 338, citing Christmas v. Russell, *supra.*

Amory v. Amory, U. S. C. C., 16 L. Reg., 45–6; Union Trust Co. v. Rochester & P. R. Co., 29 Fed. Rep., 610.

2 Am. L. Cas., 813; Freeman on Judgm., sec. 334; 2 Black on Judgm., secs. 717–8; Vanfleet's Collateral Attack, sec. 550, domestic; sec. 558, foreign.

There is no escape from the conclusion, that it appeared *from the record* not only that the plaintiffs, in obtaining the judgments assailed, did *not* prove the essential requisite of notice by *publication*, but also, that there was no *personal* notice by process served, or at least that the records were silent on that point; for the Supreme Court distinctly states, *as a fact*, that there was no personal notice. If the records did not show the fact, there was no basis for the statement, since the court below refused to hear evidence to the fact.

It may be that the records were silent on that point, and that the court considered that circumstance as justifying the statement. The reference to this case made by the opinion in the principal case, puts it thus:

> The defendant offered to prove that no service had ever been made upon any person in the suits in which the judgments were

rendered, and no notice by publication as required by the act. This court held that, as there was no service of process, the judgments were nullities. *Perhaps it appeared on the face of the judgments* in that case that no service was made; but the court held that the defendant was entitled to prove that no notice was given, and that none was published. 466.

At all events, and after all is said, there is no analogy between Webster v. Reid and the case at bar. Here the assailed record shows appearance and contest by the resident defendant in a constitutional court of general jurisdiction administering its powers according to the orderly course of the common law.

Harris v. Hardeman, 14 How., 334, was a writ of error to a judgment of the United States Circuit Court for the Southern District of Mississippi, setting aside a default judgment rendered by it at a former term against a defendant who was shown, *by the record of the case wherein the judgment was rendered*, to have had no notice of the action.

Several cases are cited in the opinion with approval, but neither of them is analogous to the case at bar, or asserts the liability to collateral attack in a Federal court sitting in a State of a judgment of a court of that State of general jurisdiction of the subject matter, and whose *record* shows jurisdiction of the person—whether by process or appearance and *contestatio litis* by counsel.

An examination of them will show that they come under one or another of the classifications already indicated by us Borden v. Fitch, 15 Johnson, 122; Buchanan v. Rucker, 9 East., 192; Bissell v. Briggs, 9 Mass.,

464; Starbuck v. Murray, 5 Wend., 148; Hallbrook v. Murray, Id., 161; Denning v. Corwin, 11 Id., 647; Wilson v. Bank of Mt. Pleasant, 6 Leigh, 570; Hollingsworth v. Barber, 4 Pet., 455.

The same is true of the three State cases cited on page 466 of the opinion in the principal case; for in each of them a *personal* judgment of a court of one State was permitted to be attacked *collaterally* in the court of *another* State.

Shumway v. Stillman, 6 Wend., 643; Aldrich v. Kinney, 4 Conn., 380; Price v. Ward, 1 Dutch., 225.

Another abstract from the same opinion makes clear that the case in the mind of the court, when it spoke of the liability to collateral attack of a judgment of a court of a State *in a court of* (*or exercising jurisdiction in?*) *the same* State, for want of jurisdiction in the court that rendered the judgment, was that wherein such last named court had not jurisdiction of the *subject matter*.

And in a number of cases, in which was questioned the jurisdiction of a court, *whether of the same* or *another* State, *over the general subject matter in which the particular case adjudicated was embraced*, this court has maintained the same general language. 467.

The decision in no case cited by the court goes beyond the import of the statement. Rime v. Himely, 4 Cranch, 269; Elliott v. Piersol, 1 Pet., 338–40; United States v. Arredondo, 6 Pet., 709, 729; Voorhees v. Bank of United States, 10 Pet., 468–78; Wilcox v. Jackson, 13 Pet., 511, 516–7; Shriver's Lessee v. Lynn, 2 How., 58–60; Hickey's

Lessee v. Stewart, 3 How., 759–63; Williamson v. Berry, 8 How., 540–4, 549.

Shelton v. Tiffin, 6 How., 162, was a *suit in equity* in the *Federal Circuit Court of Louisiana* to set aside a judgment at law theretofore rendered *in the same court*, because there was no jurisdiction of a nonresident defendant, in that he was never served with process and never employed anyone to appear for him. 176. The record at law showed that the defendant had not been served, but the answer to the bill alleged that he appeared by a licensed attorney, and the record disclosed that an attorney answered for the defendant and another, as "attorney for *defendants*." 167, 168. The complainants, however, filed a replication to the answer, and on the issue thus made, the attorney who answered in the law case testified, *without objection*, to the effect, that he had no authority to appear for and represent the nonresident defendant. 177–180. The defendants to the bill maintained, on appeal, that the fact of the attorney's authority to appear for the nonresident defendant was not traversable; the adverse contention was, that since the attorney had no authority, the judgment did not bind the nonresident defendant, 182; and the Supreme Court was of that opinion. It said, however, that the evidence of the attorney did not contradict, but *explained*, the record. 186.

But enough has been said to make manifest that the attack on the law record was *direct* and *in the same court that rendered the judgment.*

Hill v. Mendenhall, 21 Wall., 453, was on writ of error to the Federal Circuit Court for the Eastern District of *North Carolina*, wherein there was judgment for the defendant in an action of debt on a judgment of a court of *Minnesota*. The record sued on *showed on its face* that the defendant in that action was a resident of *North Carolina;* that the summons issued had been returned *not served;* that thereupon, by order of the court, service was made by *publication*, and that after such publication the defendant appeared by attorney, filed an answer verified by an agent, and voluntarily submitted himself to the court's jurisdiction. The Circuit Court gave judgment for the defendant, because it did not appear that the summons had been served on him. This ruling was assigned as error, and the assignment was sustained by the Supreme Court; for the reason that if, in fact, the defendant voluntarily appeared by attorney the judgment would bind him no less than had he been actually served with process. In the course of discussion, it was said:

> *Since* the cases of Thompson v. Whitman, 18 Wall., 457, and Knowles v. Gaslight and Coke Co., 19 Wall., 58, it may be considered as settled in this court, that when a judgment rendered *in one* State is sued upon in *another*, the defendant may contradict the record to the extent of showing that in point of fact the court rendering the judgment did not have jurisdiction of his person. If such showing is made the action must fail, because a judgment obtained under such circumstances has no effect *outside of the State in which it is rendered.* 454.

Galpin v. Page, 18 Wall., 350, was a personal action against a *minor nonresident*, who was shown

by the record of the State court, and by the finding of that court, not to have been served *in any way* with process. The court held the judgment rendered against the defendant open to collateral impugnment.

Windsor v. McVeigh, 93 U. S., 274, was the case of impeachment collaterally of a judgment rendered by a Federal court during the late war, confiscating property.

Although notice was given the defendant to appear, when he appeared and answered his answer was stricken out, his right to appear denied by the court, and his property confiscated. *All this was affirmatively shown by the record assailed.*

The Supreme Court said that the confiscation judgment was, for these reasons, "a mockery." And so it was.

Pennoyer v. Neff, 95 U. S., 714, is not pertinent. There the action was in the Federal Circuit Court of Oregon to recover land situated in that State, and the defendant's title depended upon a *personal* judgment theretofore rendered against the plaintiff, at the suit of a third party, in a court of that State. The *record* of that proceeding showed that the defendant therein was a *nonresident* of Oregon—was not personally served with process—did not *appear* in the action, and that the judgment was entered upon his *default* in not answering, upon a *constructive* service of summons by *publication*.

It is true that, in the course of the opinion, it is remarked that while the Federal courts are not foreign tribunals in their relations to the State courts, they are tribunals of a different sovereignty, exercising independent

jurisdiction, and are bound to give to judgments of State courts only such faith and credit as are due them by the courts of *another* State; but this follows, and is followed by, observations that are explanatory—being to the effect that *such a judgment as the court was considering* was without force *even in the State where rendered*, and was *by virtue of the fourteenth constitutional amendment* subject to challenge on the ground that proceedings in a court to determine the *personal* rights of those *over whom that court has no jurisdiction* do not constitute due process of law. 722–3.

The case before the court was decided just as it would have been decided in Texas; for the law there is, that where *the record shows affirmatively* service by *publication only* on a *nonresident* defendant in a *personal* action, the judgment rendered in the action is open to collateral attack anywhere.

Scott v. Streepy, 73 Texas, 547; Martin v. Cobb, 77 Texas, 546.

But this is far away from the matter in hand. The Brazoria *record* shows the case, *not* of a *nonresident* defendant, but of a defendant who was a *resident citizen of the county of the forum;* not of service by *publication*, but of *appearance of the defendant* and *answer and contest for him by attorney;* not of an action for *money*, but of an action for *land within the jurisdiction;* not of a judgment *without legitimate* force, but of a judgment *impregnable to collateral* assault in *Texas* at least—and *constituting an irrefragable link in the chain by which*

title to real property passes from one citizen to another, under the usages, laws and adjudications of the State.

And the question is: Can *such* judgment be set at naught in a *collateral* action *commenced forty years after its rendition, and thirty years after it became the source of title to one of the parties to the land in controversy, in a Federal court in and for the State whose court rendered it?*

The Pennoyer v. Neff opinion, by its own terms and as interpreted by later decisions of the court that announced it, clearly shows, that even judgments following *constructive* process to *nonresidents* must stand against collateral assault *when they are the results of actions for land within the jurisdiction*. It is said:

> In the case against the plaintiff, the property here in controversy sold under the judgment rendered was not attached, nor in any way brought under the jurisdiction of the court. Its first connection with the case was caused by a levy of the execution. It was not, therefore, disposed of *pursuant to any adjudication*, but only in the enforcement of a *personal* judgment, *having no relation to the property*, rendered against a *nonresident* without service of process upon him in the action, or his *appearance* therein. 720. * * * Such service (constructive) may also be sufficient in cases where the object of the action is to *reach and dispose of property in the State, or of some interest therein*, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or when the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in *all* actions which are substantially proceedings *in rem*. 727. * * * The question *here* respects only the validity of a *money* judgment rendered in one State *in an action upon a* simple contract against the *resident of another*, without service of process upon him, or his *appearance* therein. 736.

The case, with others in the same court—Hollingsworth v. Barbour, 4 Pet., 466, 475; Boswell v. Otis, 9 How., 336; Bischoff v. Wethered, 9 Wall., 812; Knowles v. Gaslight Co., 19 Wall., 58—is cited in the later case of Hart v. Sansom, 110 U. S., 151, to the point that a decree "*in personam merely*"—removal of cloud on title to land—against one not a citizen or resident of the State where rendered, and without other process than publication, does not bar an action by him in the Federal court of the same State for the land against the plaintiff in the former suit. There the judgment was that of a Texas court, and was attacked in a Federal court of that State. The Supreme Court said:

> The courts of the State might perhaps feel bound to give effect to the service made as directed by its statutes. But no court deriving its authority from another government will recognize a merely constructive service as bringing the person within the jurisdiction of the court. The judgment would be allowed no force in the courts of another State; and it is of no greater force, as against a citizen of another State, in a court of the United States, though held within the State in which the judgment was rendered. 155–6.

The *record* of the State judgment, held in that case not to be a bar to the suit, *showed affirmatively* that Hart (defendant in the first and plaintiff in the second suit) was a *citizen of Louisiana* and was served by *publication*, and that the judgment was by *default*.

The plaintiff in that judgment *did not allege that Hart was in possession of the land*, or that he was in privity with other defendants, or that he *held a deed*—the only

allegation as to him being that he set up some pretended claim or title. The Supreme Court ruled that the action in the Circuit Court was not barred, because the judgment in the State court for *possession* of the land did not affect Hart, *since he was not alleged to have been in possession*, and the judgment for *removal of cloud on the title* did not affect him, as, in *that* respect, it was limited to *the cloud created by the deeds held by his co-defendants.*

From beginning to end, the suit, proceeding and judgment of the State court not only sustain no *analogy* to the suit, proceeding and judgment in the Brazoria case, but the one record differs so markedly from the other that the two *contrast* at every point.

The still later case of Arndt v. Griggs, 134 U. S., 316, reviews and interprets both Pennoyer v. Neff and Hart v. Sansom, and in such wise, it is believed, as to restrict them within limits which we may frankly recognize without detriment to our contention here.

Neither of the three cases are thought to controvert in any way the proposition to which this argument is directed; but, perhaps, the obligation of counsel demands—and if not, it seems at least to justify—some analysis of each of them.

Arndt v. Griggs was on error to the Federal Circuit Court of Nebraska, wherein there was judgment for the plaintiff in an action to *recover possession of land and to quiet title thereto.* A suit had been brought in a court of that State by Flint against Hurley and another to recover the land, and to quiet title thereto. Flint alleged that

he owned and was in possession of the land; that the defendants claimed to have some title or interest in it, but it had been divested by tax deeds held by the plaintiff, and was inequitable, and a cloud upon his title. The defendants were served with notice of the suit *by publication*, and a decree was rendered for the plaintiff quieting his title.

These proceedings were authorized by the statutes of the State. Thereafter, Griggs, the grantor of the defendants in the suit in the State court, sued Arndt, the grantee of the plaintiff in that suit, in ejectment in said Federal court to recover possession of and quiet title to the same land. The trial judges certified a division of opinion on the question whether the State decree was valid and operative to quiet the title in the plaintiff therein, or, as stated by the Supreme Court:

> Has a State the power to provide by statute that *the title to real estate within its limits* shall be settled and determined by a suit in which the defendant, *being a nonresident, is brought into court only by publication?* 319.

Referring to Watson v. Ulbrich, 18 Neb., 189, and Castrique v. Imrie, L. R. 4 H. L., 414, 429, as authority for the conclusiveness of the State court decree *as to the title to the land*, until set aside, the court considers the contention of counsel, relying on Hart v. Sansom, that no decree in such case, rendered on service by publication only, is valid or can be recognized in the Federal court—inasmuch as an action to quiet title is a suit in equity; that equity acts upon the *person;* and that the person is

not brought into court by publication service only. It was not denied that these propositions were sound as statements of general rules respecting bills to quiet title, and proceedings in courts of equity, but it was said that they were not applicable:

> The question is not what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, *what jurisdiction has a State over title to real estate within its limits*, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of nonresidents to such real estate? * * * It (the State) has control over property within its limits; and the *condition of real estate therein*, whether the owner be stranger or citizen, is subjection to its *rules* concerning the holding, the *transfer*, liability to obligations, private or public, *and the modes of establishing titles thereto*. * * * The well-being of every community required that the *title of real estate therein shall be secure*, and that there be convenient and certain methods of determining any unsettled question respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, *the manner of discharging it must be determined by the State*, and *no* proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. * * * In United States v. Fox, 94 U. S. 315, 320, it was said: "The power of the State *to regulate the tenure of real property* within her limits, *and the modes of its acquisition and transfer*, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the *necessity* of the case, that *the disposition of immovable* property, *whether by deed, descent, or any other mode*, is *exclusively* subject to the *government within whose jurisdiction the property is situated*." See also McCormick v. Sullivant, 10 Wheat., 192, 202; Beauregard v. New Orleans, 18 How., 496; Suydam v. Williamson, 24 How., 427; Christian Union v. Yount,

101 U. S., 352; Lathrop v. Bank, 8 Dana, 113, 320-1. * * * In Essig v. Lower, 21 N. E. Rep., 1090, the Supreme Court of Indiana thus expressed its views on the question: "It is also argued that the decree in the action to quiet title, set forth in the special finding, is *in personam* and not *in rem*, and that the court had no power to render such decree on publication. While it may be true that such decree is not *in rem*, strictly speaking, *yet it must be conceded that it fixed and settled the title to the land in controversy*, and to that extent partakes of the nature of a judgment *in rem*."

Dillen v. Heller, 39 Kan., is referred to by the court as being later than Hart v. Sansom, and answering affirmatively the question put thus:

Has the State any power, through the Legislature and the *courts*, or by any *other* means or instrumentalities, to *dispose of* or *control* property in the State belonging to nonresidents out of the State, where such nonresident owners will not voluntarily surrender jurisdiction of their persons to the State or to the courts of the State, where the most urgent public policy and justice require that the State and its courts should assume jurisdiction over such property? 322-3.

The court reviews many other cases to like purport.

Among other cases, the court explains *Boswell v. Otis*, 9 How., 336, cited in Hart v. Sansom, as recognizing the rule, that while in a suit for specific performance and accounting service by publication does not warrant an adjudication that the amount due on such accounting shall operate *as a judgment at law*, yet, as to the matter of *specific performance alone*, jurisdiction might obtain as to the *property* as well by *bill in chancery* as by *attachment*, the former being substantially a proceeding *in rem*

where authorized by statute on publication, without personal service. 324.

The court might have shown, also, that the remaining cases cited in Hart v. Sansom do not sustain the general statement to which they are, in the opinion in that case, adduced.

Hollingsworth v. Barbour, 4 Pet., 466, 475, holds that the proceeding before it was *unauthorized by the law* providing for service by publication, and that the decree was therefore *void*. That decree was rendered by a State court of Kentucky, and the court in which it was attacked as void was the Federal Circuit Court of that State. The following declaration of the latter court, repeated by the Supreme Court, is most significant:

> Upon general principles, the decree of the Washington Circuit Court must have the *same* force and effect, and *none other* in *this* court, than it would or ought to have *in any Circuit Court of the State*. 470.

Bischoff v. Wethered, 9 Wall., 812, was the case of a judgment recovered in *England* against a person in the *United States*, without process or any notice of the suit other than a personal one served on him in the United States. It was held to have no validity in this country, even of a *prima facie* character.

Knowles v. Gaslight and Coke Co., 19 Wall., 59, rules, that in a suit in the Federal Circuit Court of *Minnesota* on a *personal* judgment of a State court of *Indiana*, the defendant in that case, who was shown *by the record* thereof *not to have been a resident of Indiana*, could deny

the sheriff's return of process on him personally, and prove that the return was false. Thompson v. Whitman, *supra*, is followed.

It is to be observed that the court qualifies its ruling thus:

> We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. *Where the defendant resides in the State in which the proceedings are had*, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the State. But *in the case of nonresidents, like that under consideration*, personal service can not be dispensed with *unless the defendant voluntarily appears*. 61–2.

Obviously, the case is widely apart from the one at bar. There the *record* showed that the defendant was a *nonresident;* here the *record* shows that the defendant was a *resident*. There it appeared from the *record* that the defendant did not appear voluntarily or *otherwise*, and that the judgment against him was by *default* in a *personal* action; here it appears from the *record* that the defendant *came*, and by attorney *answered and contested the action from beginning to end*, and that the action and judgment were for *land within the jurisdiction*, the judgment being, in the courts of Texas, unassailable collaterally, and a recognized medium of *vesting title to land*.

St. Clair v. Cox, 106 U. S., 350, was an action in the Federal Circuit Court of Michigan to recover the amount of promissory notes made by the defendants to the Winthrop Mining Co., and by it transferred to the plaintiff after maturity. One of the defenses was, that before the

plaintiff acquired the notes the mining company was indebted to the defendants in a sum exceeding the amount of the notes, by a judgment recovered by them against that company in a State court of Michigan. A certified copy of the judgment record was offered in evidence by the defendants, and, upon the plaintiff's objection, excluded by the court. The error assigned was the exclusion of that record, which *itself*, as understood by the Supreme Court, disclosed that there was neither *personal service* on the defendant (*a nonresident corporation*), nor *appearance* of the defendant in the action, and that the judgment was by *default*. The Supreme Court considered that the proceeding was *not authorized by the laws of Michigan*, and that this view was supported *by a decision of the Supreme Court of that State*.

Pana v. Bowler, 107 U. S., 529, was an action in the Federal Circuit Court of Illinois, by citizens of Maine to recover of the town of Pana, Illinois, the amount of certain coupons of bonds issued by it. The general issue was pleaded, and, a jury being waived, the judgment was rendered for the plaintiffs. *There was an agreed statement of facts by the parties, and a special finding of facts by the court.* From these and the pleadings, the facts before the Supreme Court, on the defendant's writ of error, appeared.

In a prior suit by the town of Pana and certain taxpayers against named defendants residing in Illinois, and "*the unknown holders and owners*" of said bonds and coupons, in a State court of Illinois, a decree was ren-

dered for the complainants and against the defendants, declaring the bonds void, and enjoining the holders thereof from selling, negotiating or suing on them or on the coupons attached to them. The defendants named in the bill and decree were either served with process or voluntarily appeared; and it was assumed that "the unknown holders and owners" were brought in by notice to them, under that designation, by *publication*, according to the laws of Illinois. It was insisted by the plaintiff in error that that decree was a bar to the action on the coupons; but the Supreme Court, affirming the judgment of the trial court, rejected that contention, and after citing Pennoyer v. Neff, and similar cases, said:

> These authorities settle the rule which is conclusive of this question. It would be a reproach to jurisprudence if the rights of citizens of Maine to recover the contents of a chose in action, held and owned by them, could be cut off by a suit in Illinois to which they were not made parties by name, and in which there was no personal service or appearance.
>
> It is insisted by counsel for the plaintiff in error that the decree of the State court recites the fact that the persons made defendants under the designation of "the unknown holders and owners of bonds and coupons issued by the town of Pana," which includes the defendants in error, appeared in that court, and that they are, therefore, concluded by the decree in the case.
>
> *There is no pretense that there was any appearance in fact* of the parties referred to. It is sought to conclude them by a loose expression in the decree, which, in our opinion, *was clearly not intended to recite their appearance, and is not fairly open to such a construction.* 545–6.

Hall v. Lanning, 91 U. S., 160, was an action of *debt* in the Federal court of *Illinois*, on a judgment of a State court of *New York* against two defendants, partners.

The plaintiffs put in evidence the record of the judgment, and closed. The record showed that an attorney had appeared and answered for both defendants. Thereupon, one of the defendants offered to prove his nonresidence and noncitizenship of and his absence from New York; the want of process or notice to him of any kind in the action; the nonauthorization by him of anyone to appear for him or to employ another to do so, and his nonappearance in person therein; his ignorance of the action until the pending action was begun, and the dissolution of partnership with his co-defendant and due published notice thereof six months prior to the commencement of the New York action. A divided court, upon writ of error, held that the trial court erred in refusing the evidence offered. The counsel for the plaintiff in error relied upon the general rule of law *in New York*, that "want of jurisdiction may *always* be interposed against a judgment when sought to be enforced, or when any benefit is claimed from it; the want of jurisdiction, either of the subject matter or of the person of either party, renders the judgment a mere nullity;" and cited *decisions of the courts of that State* to the effect, that for the purpose of showing want of jurisdiction *the recitals in the judgment record may be contradicted.* He stated, however, an exception to the general rule—and maintained its inapplicability outside of New York—to the effect, that a party for whom an attorney has appeared without authority can not dispute the authority of the attorney when the judgment is questioned, save by a *direct pro-*

ceeding in the court where the judgment remains. The inapplicability of the exception extraterritorially was put on the ground that the *reasons* for it failed if applied—such reasons being, that *the title to real estate in New York depends to a great extent upon the records of its courts*, whereas such titles could not be affected by suits on such records in *another* State. The observation of counsel applies with not less force, to say the least, to titles to real estate in Texas.

The decision proceeds on the theory that the court of New York is *foreign*, or is to be so regarded when its jurisdiction is challenged in *another* State; but that it is not of the same character and authority as a *domestic* court; and that a domestic court is one *in the State where jurisdiction is exercised*, seem to be fair, if not indeed necessary, results of the court's language:

> Domestic judgments undoubtedly (as shown in Thompson v. Whitman) stand, in this respect, on a different footing from foreign judgments. *If regular on their face, and if appearance has been duly entered for the defendant by a responsible attorney, though no process has been served and no appearance authorized*, they will not necessarily be set aside; but the defendant will sometimes be left to his remedy against the attorney in an action for damages; otherwise, as has been argued, the plaintiff might lose his security by the act of an officer of the court. Denton v. Noyes, 6 Johns., 296; Grazebrook v. McCreedie, 9 Wend., 437. But even in this case it is the more usual course to suspend proceedings on the judgment, and allow the defendants to plead to the merits, and prove any just defense to the action. *In any other* State, however, *except that in which the judgment was rendered* (as decided by us in the cases before referred to), the facts could be shown, *notwithstanding the recitals of the record;* and the judgment could

be regarded as null and void for want of jurisdiction of the person. 167.

Earl v. Mc Veigh, 91 U.S., 503, does not involve the question at all. There the inquiry was as to the validity of judgments *in personam* of a State court, rendered by *default* on constructive service of process, which, *together with a stipulation of the parties as to the facts*, were submitted to the inquiring court *as the determining basis of decision*. The issue was first presented to an equity court *of the State* by a bill of complaint of the defendant to enjoin proceedings to enforce payment of the judgments, because the return to the process was false and fraudulent. The bill averred the facts relied on to show that the judgments were illegal, "and should be *set aside*." The *State* court granted, and, on hearing, refused to dissolve the temporary injunction. *Thereupon*, the suit was removed to the Federal trial court, on petition of the respondents; the parties were again heard; a decree was entered "*that the injunction heretofore granted in the cause be perpetuated*, and that the respondent pay to the complainant his cost," and from this decree the respondent appealed to the Supreme Court. The latter court, affirming the decree, held the judgments assailed void.

So, it appears, that the decree of the Supreme Court was the affirmance of the justice of a *direct* attack of a judgment *in personam*, on constructive service, of a State court, begun and maintained *in an equity court of the same State*, and continued, with like result, in the Federal

court, to which the battle ground had been shifted in due course.

Neither in the State court of equity nor in the Federal court was the suggestion made that the attack on the judgment was inadmissible, because collateral; the judgment record was not claimed to be conclusive in either of those courts, but instead its correct interpretation was referred, in part, to facts *aliunde*, recited in the stipulation of the parties.

Presumably, the laws and practice of that State permit, in such case, inquiry as to the truth of a record when questioned by a proceeding in a court of equity of the State to annul a personal judgment for fraud and falsehood in the return of process; and certain it is that neither fraud nor falsehood can be asserted *collaterally* against a judgment, whether domestic or foreign. Christmas v. Russell, 5 Wall., 306.

Hamilton v. Browne, 161 U. S., 256, 274–5, does not aid the inquiry. It decides, merely, that a judgment of a Texas court escheating land, in pursuance of a mode prescribed by law, stands against demurrer of the heirs of the original owner.

Renaud v. Abbott, 116 U. S., 277, was on error to the Supreme Court of *New Hampshire* to review a judgment of that court rendered in an action on a *personal* judgment of a court of *Louisiana* against two partners *in solido*, one only of the partners having been served with process; and it was against him only that relief was

sought in the New Hampshire court. The *record of the Louisiana judgment* disclosed the *non-residence* of both defendants and service of citation on but one. Conceding the validity of the judgment under the law of Louisiana, the New Hampshire court held it not enforceable, and, indeed void, under the law of New Hampshire; since it could have no other effect when *sued on* in that State than if it had been *rendered* there.

This court reversed the judgment; holding, that, as the law of Louisiana enforces by judgment the personal obligation of the defendant served or appearing in the action, the judgment must have the same effect given to it in every other State.

In brief, the case presented is the common one of collateral attack in the court of *one* State on the judgment of the court of *another* State. And, to render the citation still more inconsequental, the evidence adduced to support the attack is *not aliunde, being supplied by the very record assailed.*

Grover and Baker Sewing Machine Co. v. Radliffe, 137 U. S., 287, and *Simmons v. Saul*, 138 U. S., 439, are, alike, impertinent to the question here. The first involved the correctness of an adverse judgment of a court of *Maryland* against a plaintiff seeking recovery on a *personal* judgment of a court of *Pennsylvania*; the second was on appeal from a decree of the Federal court of *Pennsylvania* sustaining a demurrer to a bill to set aside a judgment of a court of *Louisiana.*

Guaranty Trust Co. v. Green Cove Railroad, 139 U. S., 137, reverses a decree of the Federal Circuit Court of Florida dismissing a bill charging the nullity of the proceedings of a court of that State and of a sale made thereunder of certain property which the complainant sought to subject to a mortgage lien. The point was that the complainant had no proper notice of the proceedings in the State court, in that the *publication of notice* was not, as required by the Florida statute in the case of *nonresidents*, "made once a week for four months." *It appeared from the record of the State court* that that court ordered publication for four months, and that such publication was not made. This court said:

> It is the settled law, both of this court *and of the Supreme Court of Florida*, that the word "month," when used in contracts or statutes, must be construed, where the parties have not themselves given to it a definition, and there is no legislative provisions on the subject, to mean calendar and not lunar months. 145.

Even were the concession made that the case at bar is to be determined as if the Brazoria judgment were merely *personal*, still it remains that *appearance of the defendant by counsel*, shown by the record, is not less conclusive of jurisdiction of his person, when denied collaterally, than would be the record of *service by publication*, and the limit of such denial in the latter case has not been extended by this court beyond the doctrine quoted in the case just considered, from the opinion in Galpin v. Page, 18 Wall., 350, 368, 369:

Whenever it appears *from the inspection of the record* of a court of general jurisdiction that the defendant, against whom a personal judgment or decree is rendered, was at the time of the alleged service *without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action,* the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. 148.

The nature of the Galpin case has been already disclosed in this argument. The judgment of the trial court of California, there relied on, was rendered in a *personal* action against one *shown by the record itself* to be a *minor nonresident* against whom service of summons by *publication* was ordered, but, *according to the Supreme Court of the State,* as well as this court, *never lawfully made.* The judgment was, indeed, *reversed* by the Supreme Court of the State, for two reasons—one being the insufficiency, *under the statute of the State*, of the service on the minor.

This court ruled that the *record of the State court showed affirmatively* that that court never acquired jurisdiction of the person of the minor defendant.

Swift v. Meyers, 37 Fed. Rep., 37, Deady, J., was the case of collateral attack in a Federal court of Oregon of a judgment by *default* of a court of that State rendered in a suit to enforce on land the lien of a mortgage to secure a debt—the suit being considered by the Federal court "as *in personam* and *in rem.*" The question was the sufficiency of service on the defendant in the State court to warrant the default; *and it was submitted*

on a stipulation of the parties exhibiting the summons, or citation, to the defendant, and the officer's return thereon—concluding that "*if the summons is valid, and the return is sufficient to show due service of the same on Grigsby* (the defendant in the State court), the defendants are entitled to a judgment in the action, but, if not, the plaintiff is entitled to judgment." That is to say, it was neither more nor less than a submission to the Federal court of the inquiry: Does the *record of the State court show on its face* that there was no *jurisdiction* of the defendant, by reason of the nature of the *summons* or of the *return* —these being the *only* evidence presented by the *record* to the point of *jurisdiction* of the defendant's *person?*

It is true, that counsel, *admitting the insufficiency of the return*, contended that the judgment thereon of the State court was *valid in the courts of the State* and could not be questioned collaterally in the Federal court, where it must be regarded as *domestic;* and that the court rejected the contention, citing some of the cases elsewhere considered: but if, *in the face of the stipulation*, there be relevancy either in the proposition or in the discussion of it, still the fact remains that the court *had no evidence of the sufficiency or insufficiency* of the summons and return *aliunde the record of the State court*, as exhibited by the stipulation. The proposition ruled by the Federal court is, that, *on the face of the record of the State court*, that court did not acquire jurisdiction, and, therefore, its judgment was *void*. That ruling the

Federal court had *jvrisdiction* to make, irrespective of the character of the judgment, as foreign or domestic.

Moreover, the statement of the court, *arguendo*, that, as to it, the judgment of the State court was not domestic, is impertinent to the issue before it, because, whether domestic or not, the judgment on such service of summons as the court had before it was *void according to the decisions of the courts of the State, and was open to challenge in those courts.* Far more to the issue here, is the declaration of the court, that *the return could not be contradicted, save in a proceeding in equity to overthrow the judgment.* The material matter of the opinion is fully reflected by its concluding sentences:

> In conclusion, it does not appear *from the record* that Linn County was Grigsby's "usual place of abode" in the State at the date of the service of the summons on Mary Backus for him, and there is no presumption that it was, and *therefore* it does not appear that the service or notice *required by the statute* was had or given, or that the Circuit Court of Linn County *ever acquired jurisdiction* to order a sale of the property.
>
> It is not necessary to consider the objections to the *service*, nor whether the plaintiff could in *this* action *contradict the return of the sheriff, so as to show that Grigsby, at the date of the service on Mary Backus, had no place of abode in Linn County, or even in the State.* The question was argued and submitted upon the understanding that if the court found the return sufficient, the plaintiff would then, *if allowed, offer evidence to contradict it*, as suggested. As I have said, *my opinion is that the return can not be contradicted, except in a suit in equity, brought for the purpose of setting aside the judgment thereon.* 45–6.

Reinach v. Atlantic, etc., R. Co., 58 Fed. Rep., 42, 43, states the general proposition, that the judgment of a

court having no jurisdiction of subject matter or parties is void, and impeachable collaterally by parol evidence contradicting the record, citing, however, no case involving the collateral impugnment of the record of a State court of general jurisdiction by a Federal court sitting in the State.

Besides, the court conceded that if the action of the State court complained of "involved a jurisdictional question," it was not of that character which could be reviewed in the pending collateral proceeding.

That is to say, the *abstract proposition* and *the thing adjudged*, were wide apart.

Citizens' Bank v. Brooks, 23 Fed. Rep., 21, was an *action of debt* in the Federal Circuit Court of *Vermont* on a judgment of a Federal Circuit Court of *Kansas*. The Kansas *record* showed service by attachment of property of the defendant *as a non-resident of Kansas*, and an appearance and answer for him by attorneys. The court permitted him to show *aliunde* that the attorneys had no authority to appear for him. It seems to be the doctrine of the opinion, that the Kansas judgment was good in so far as it affected the *property* attached, but was open to evidence of the want of authority of the attorneys when sued on as a *personal* obligation. That judgment was considered precisely as is a judgment rendered by a court, whether State or Federal, in *one* State when assailed in a court, whether State or Federal, in *another* State, the authorities cited being the familiar cases of Thompson v.

Whitman, 18 Wall., 457; Knowles v. Gaslight Co., 19 Wall., 58; Hall v. Sanning, 91 U. S., 160. That is, as to the Federal court in *Vermont* the judgment of the Federal court in *Kansas* is foreign, *not domestic*.

Gray v. Larrimore, 4 Sawyer, 638, is practically identical with that of Galpin v. Page, 18 Wall., *supra*, and does not call for additional comment.

Surely the line of distinction between the various cases reviewed and the one at bar have been already sufficiently indicated

It will be permitted to me, even at the peril of tediousness, to make plain that the application to *domestic* records of the proposition advanced in general terms in the opinions in Thompson v. Whitman, *supra*, and kindred cases, is utterly inadmissible; and to claim that the authorities, as understood by commentators who seem to enjoy and deserve the confidence of the profession, with practical unanimity reject it. To economize space, the citations made by the commentators are omitted, save when their inclusion seems useful to point the particular test.

1 Smith's L. Cas., Part 2, Notes to Crepps v. Durden:

Few rules are supported by a greater weight of authority and reason, or have been longer or more generally regarded as established law, than that which holds that the proceedings of superior tribunals must be presumed to be correct, unless *manifestly* erroneous, and can not be contradicted or convicted of error by

extrinsic evidence. 1199. * * * So that even when a judgment is obtained by *fraud*, the only remedy for the injured party *lies in a recourse to equity;* * * * or an application to the court *in which the proceedings took place* to set them aside, and let him into a defense; * * * although a *stranger* whose interests are prejudiced by a fraudulent judgment may show that it was the result of collusion between the parties. 1100. * * * It results from what is here said, that unless for some *manifest* defect or want of jurisdiction, the act of superior tribunals are valid without the aid of proof or averment, and it is a *necessary* inference that *they can not be impeached or set aside by extrinsic evidence.* * * * A somewhat different view has, however, been taken by some of the American courts, and it has been held that no tribunal can decide the question of jurisdiction finally and conclusively in its own favor, because, *in the absence of jurisdiction*, it has no authority to decide, and the whole question is *coram non judice* and void (citing Starbuck v. Murray, 5 Wend., 148, and others of the class referred to in Thompson v. Whitman)—that a court can not acquire jurisdiction *by a false recital of the facts* necessary to give jurisdiction, and that every such recital is consequently *open to contradiction*. This view was cited with approbation in Harrington v. The People, 6 Barb., 608, and Noyes v. Butler, Id., 613, and said to apply to *superior* as well as to *inferior* tribunals. The doctrine rests on *dicta*, rather than *decision*, because the cases of Borden v. Fitch, 15 Johns., 121, and Denning v. Corwin, 11 Wend., 648, fall under the principles which regulate the jurisdicti of *inferior* courts and the courts of *other* States, and are *not in point* in questions arising with reference to the *superior* courts of the *same* State. 1103. The same remark applies to Harrington v. The People and Noyes v. Butler, and the decision in both cases was, moreover, in favor of the *validity* of the record, not against it. The question is therefore open for investigation *as one of principle*.

There are undoubtedly a great number of cases in this country which give *color* to the assertion, that the jurisdiction of *superior* as well as *inferior* tribunals may be attacked and set aside in the course of subsequent and *collateral* proceedings. Thus it has been said by the highest judicial tribunal of the Union, that every court which is called on to recognize or enforce the proceedings

of another, *is entitled to examine into the authority on which they are based, and to disregard them as nullities when without jurisdiction.* Williamson v. Berry, 8 How., 495; and the same position has been taken in other instances: Campbell v. Brown, 6 How. (Miss.), 106; Gwin v. McCarroll, 1 Sm. & M., 351; Enos v. Smith, 7 Id., 85; Schaefer v. Gates, 2 B. Mon., 453; Bloom v. Burdick, 1 Hill, 130; Hollingsworth v. Barbour, 4 Pet., 466; Eliott v. Piersol, 1 Id., 340; Wilcox v. Jackson, 13 Id., 498; Shriver's Lessee v. Lynn, 2 How., 43; Lessee of Hickey v. Stewart, 3 Id., 750; Williamson v. Ball, 8 Id., 566; Demerit v. Lyford, 7 Foster, 541. But these cases will be found, when examined, *not to go beyond* one of these two propositions, that the acts of *inferior* courts are not good unless *prima facie* within their jurisdiction; the acts of *superior* courts void, when *manifestly* beyond their jurisdiction. 1104.

The doctrine of Starbuck v. Murray, 5 Wend., 156, quoted in Thompson v. Whitman, 18 Wall., 466, and furnishing the basis of reasoning in that and other cases, is stated and answered thus:

It has, indeed, been said that since jurisdiction is necessary to give the right to adjudge, the adjudication can not be used as proof of jurisdiction without reasoning in a circle. But this argument hardly makes up in logic for what it wants in practical wisdom, *and is open to the objection of assuming the point in dispute as one of the premises on which to found a conclusion.* When a complaint or allegation is laid before a judge or magistrate, which it is his duty to hear and investigate, he must *necessarily* proceed to determine whether it is sustained by the evidence, and having once obtained jurisdiction for this purpose, his decision must be regarded as *conclusive*, and stand until reversed, in the course of some proceeding instituted for the discovery and correction of error. Although the power of a court of justice is seldon universal, and is, on the contrary, for the most part, delegated for certain purposes which are not unfrequently defined by statute, it still carries with it, *ex necessitate rei, the right to determine whether each particular case is within the limits of the power;* because the court would otherwise be at a standstill, and could not pro-

ceed with the transaction of business. *If the subject matter* is *necessarily* beyond the authority of the tribunal, the defect will appear *on the face of the proceedings*, and they can not be relied on as a defense or cause of action. But when *the nature of the controversy* is such that it might be lawfully heard and determined by the court, *the presumption that it was so considered is irrefragable*, and their judgment will be as conclusive on the question of *jurisdiction* as on any other matter at issue in the suit. It is a characteristic attribute of the judgments of *superior* courts to *suffice for their own support*, and be in *themselves* proof that the authority of the tribunal was *properly* exercised. 1106. * * * In Sheldon v. Wright, 1 Selden, 497, it was held to follow, for like reasons, that when a superior or inferior court has jurisdiction over the *cause*, the judgment will not be set aside, because the defendant was not warned as the law requires, if it appears that the question whether the writ was duly served or published was considered and decided when the judgment was rendered, *although on insufficient evidence, and without actual notice to the party whose rights were affected by the decision*. Similar language was held in an able opinion delivered by Scott, Justice, in the case of Borden v. The State, 6 English, 519, and *every step in the process by which justice is administered*, said to be an exercise of judicial power, and therefore *conclusive*, unless *manifestly* invalid. * * * And as the judicial power is anterior to the service of process, so notice is a mode by which jurisdiction is *exercised*, and not the means through which it is *acquired*. *Proceeding to judgment is virtually a decision that the defendant is regularly before the court, and is as binding on this point as on any other involved in the cause*. 1113–4. * * * While *domestic* judgments are tried, in some particulars, by a severer test than those of *foreign* tribunals, they are guarded in others by stronger barriers, and if the *record* avers *notice* or *appearance*, *it can not be contradicted by extraneous* evidence. *Landes v. Brandt*, 10 How., 348; Saffermen v. Terry, 8 S. & M., 420; Granger v. Clark, 20 Me., 128; Cook v. Darling, 18 Pick., 393; Richards v. Skiff, 8 Ohio St., 586; Trimble v. Long, 13 Id., 431. The judgment is sustained under these circumstances, not because a judgment rendered without notice is good, but because *the law will not permit any proof to weigh against that which its policy treats as absolute verity*, and remits the injured party to his remedy against

the person by whom the record has been falsified. Wethered v. Gass, 26 Vt., 748; Trimble v. Long, *supra*. 1119. * * * And whatever the rule may be where the record is *silent*, it would seem to be clearly and well established, by a weight of authority too great for opposition, unless on the ground of local or peculiar law, that no one can contradict what it actually avers, and that *a recital of notice or appearance, or a return of service by the sheriff*, in the *record* of a *domestic* court of general jurisdiction. Granger v. Clark, 22 Me., 128; Cook v. Darling, 18 Pick., 393; or *even* of *limited* and *inferior* powers, Prower v. Turner, 12 Ala., 752; Lightsey v. Harris, 20 Id., 411; Baird v. Campbell, 4 W. & S., 191; *is absolutely conclusive, and can not be disproved by extrinsic* evidence. Cooper v. Sunderland, 3 Clark, 114; Trimble v. Long, 13 Ohio St., 431, 439. * * * The presumption that the powers committed to judicial tribunals have been properly exercised is *essential to the repose and safety of society, and the inconvenience of allowing it to be met and overcome by parol evidence is greater than any benefit that could be derived from a different rule.* 1127.

Freeman on Judgments, sec. 134—after presentation in preceding sections of the substance of the controversy on this topic and showing that in so far as Starbuck v. Murray and like cases reflect the suggestion that *domestic* judgments are liable to collateral attack, they are mere *dicta*—concludes:

All the arguments adduced to show that the inquiry into the jurisdiction over the parties in the tribunal pronouncing judgment should on all occasions be considered as open, seem to admit of ready answers. That the matters intended by a court of record for its memorials may be proved not to be *a record* by parol evidence, is in conflict with the principles recognized from the earliest times of our common law, that the plea of *nul tiel record* was to be decided only by inspection of the alleged matter of

record. The court has ample authority to make a record, *and it is not true that this authority is dependent upon jurisdiction over the party against whom the record speaks.* Neither is it true that maintaining the verity of the record, in *collateral* proceedings, is more repugnant to *natural* justice than the opposite course would be. A party who has been wronged by being judged without any opportunity to make his defense, may avoid the adjudication in various ways. He may appeal to some higher tribunal; he may move in the tribunal where it was pronounced and have it set aside; or he may seek and obtain *equitable* aid to prevent its execution. It is true he can not, generally, affect the rights of innocent third parties growing out of a judgment regular on its face. But as to these parties it would be as great a violation of the principles of "natural justice" to deprive them of property acquired for a valuable consideration, by establishing some hidden infirmity preceding the judgment, as it is to deprive the defendant of *his rights* by maintaining the integrity of the record. And as the law can not administer abstract justice to all the parties, it is at liberty to pursue such a course *as will best subserve public policy.* This course requires that there should be confidence in judicial tribunals, *and that titles resting upon the proceedings in these tribunals should be respected and protected.* The hardship arising from an erroneous or inadvertant decision upon *jurisdictional* questions is no greater than that issuing from an erroneous or inadvertent decision upon *other* matters. That the reversal of a judgment in an *appellate* court shall not affect rights acquired under it by third parties, is a rule universally and uncomplainingly acknowledged.

This section of Freeman, and other sections—among them 124, 130–133, and 334—of like purport, are adopted by the Texas courts, as appears by cases already noticed, and many others.

Vanfleet's Collateral Attack on Judicial Proceedings:

The principal trouble has arisen from the mistaken conception that *jurisdiction* depends upon *facts*, or the *actual existence* of mat-

ters and things, instead of upon the *allegations* made concerning them. If certain matters and things are *alleged* to be true, *and relief prayed which the tribunal has power to grant, if true, that gives it jurisdiction over that proceeding, and it must proceed and determine it, or neglect its duty.* § 58, p. 71. * * * The rule is this: *Can it be gathered from the allegations, either directly or inferentially, that the party was seeking the relief granted, or that he was entitled thereto?* If it *can* the *allegations* will shield the *judgment* from *collateral* assault. §61, p. 79. * * * The test of jurisdiction is whether the tribunal has power *to enter upon the inquiry,* and not whether its conclusions in the course of it were right or wrong. §61, p. 82. * * * The complete record is before the court in each case, and it is conclusively presumed to know its contents; and the law applicable thereto, it is sworn to apply to the best of its ability. Hence, any step taken is an application of the law to all the facts disclosed by the record, *and necessarily implies the right to take that step.* §62, p. 83. * * * Where a court of general jurisdiction *assumes* jurisdiction, *the existence of all facts necessary to confer* jurisdiction are presumed to exist. * * * The assumption of jurisdiction and the exercise of authority *is a decision* upon the question of *notice* without any formal entry declaring the notice sufficient. §62, pp. 84, 85. * * * They attempt to draw a line between the *facts* constituting the cause of action, and the *facts* constituting the jurisdiction of the court. But as neither the jurisdiction nor the cause of action depend upon *facts,* but upon *allegations* as is shown in section 60, *supra,* there is nothing to found the distinction upon. §63, p. 92. * * * The Supreme Court of Illinois said: "The *record* of a court *can never be contradicted, varied or explained by evidence beyond or outside of the record itself. Any other rule would be most disastrous in its results.* A judicial record contains evidence of its own validity, and should testimony *dehors* the record itself be admitted to contradict or vary its recitals, it would render such records of no avail, and definitive sentences would afford but slight protection to the rights of parties once solemnly adjudicated. Hence all records must be tried and construed by *themselves.*" The Supreme Court of Louisiana said: "Absolute nullities in judicial proceedings are such as result from radical defects, omissions and irregularities *appearing on the face*

of record, and are not dependent on matters *in pais* to be established aliunde." §526, pp. 536–37.

Referring to Starbuck v. Murray, 5 Wend., 156, *supra*, as being foundation of the doctrine of the liability to collateral attack of judgments of courts of general jurisdiction, the author says:

> It sounds plausible to say that "No court can acquire jurisdiction by the mere assertion of it," but it is not sound in law. The fallacy lies in confusing *law* with *right*. A judgment may not be *right*, and it may unjustly sweep away the life, liberty or property of the defendant; yet is *lawful*, and a just and rightful foundation *for the titles of others;* and although wrong in itself, it is *lawful and right collaterally*. The question of *service* or *appearance must be decided by the court in each case, as a question of fact;* and it it is the *allegation* of the plaintiff that he has caused service to be made or the defendant to appear, which gives the jurisdiction to hear his evidence on the point. §468, p. 472.

Indeed, the conclusiveness of the record against other than direct impeachment extends to the fact of the *life* or *death* of the parties, since the *entry of the judgment is itself an indisputable finding* of the fact. Id., §602, citing Trail v. Snouffer, 6 Md, 308, 314; Wilcher v. Robertson, 78 Va., 602, 616.

Recurring to *Arndt v. Griggs*, 134 U. S., 316, and to what is there and in kindred cases announced, to the effect that a State may provide modes of determining title to land not less conclusive, when pursued, against a non-resident than a citizen—whether by attachment or other proceeding *in rem*, or by statutory publication of notice

of the action—it is to be observed, that it must be *as much* in the power of a State to vest and divest title to land by local usages that have acquired the force of law, or by adjudications of its courts, establishing rules of property.

The question must necessarily be: Is there in the State established—whether by its usages or common law, or by statute, or by adjudications of its court—*a rule of property* whereby the title to land within its territory may be determined, vested and divested; and if so, is the title asserted in the case at bar by the defendants below protected by the rule? If the answer be affirmative, no other sovereignty can disregard, change or modify the rule, or deny the conclusiveness of its operation.

Such a rule obtains in Texas. It is, that where the action of trespass to try title—in which any controversy involving the title to land or to an interest therein can be tried—results in a judgment for a party to the action, the title is thereby fixed in that party and can not be disputed by the other party or his privies, in any collateral proceeding, *unless the record in the action affirmatively shows that the court rendering the judgment was without jurisdiction.*

See Texas cases, *supra.*

The record of the Brazoria action of McGreal against Newell not only does *not* show affirmatively that the Brazoria court was *without* jurisdiction of either the subject matter or the parties, but it *does* show—and affirma-

tively—that it *had* jurisdiction of the subject matter and of the parties.

As to the *subject matter:* The District Court of Brazoria County was, and is, a court of general jurisdiction, having power to try and determine title to land. This was not disputed by the defendants in error—their sole contention in this connection being directed, apparently to *venue*, and not *jurisdiction*, in that the land involved was in *Harris*, and not *Brazoria* County.

By an act to regulate proceedings in the District Court, approved May 13, 1846, the venue of different actions was prescribed, and, among others:

> Art. 667, Hartley's Digest. * * * Eleventh.—In cases where the recovery of land, or damages thereto, is the object of the suit, in which cases suit must be instituted where the land or a part thereof is situated.

It has been repeatedly ruled that this and similar statutes do not in any manner restrict the court's *jurisdiction* of an action for land lying in a county other than that wherein the action is instituted.

De la Vega v. League, 64 Texas, 214–5; Tevis v. Armstrong, 71 Texas, 62; Bonner v. Hearne, 75 Texas, 251–2, citing many cases.

As to the *parties*, the jurisdiction of the Brazoria court, as shown by the record in the case of McGreal v. Newell, has been already fully exhibited. ~~R., 70–4, 81–6, 114–9.~~ Certif. 3–4.

Jackson v. Chew, 12 Wheat., 153, involved the construction of a *devise of land* in New York. The court said:

The inquiry is very much narrowed by applying the rule which *has uniformly governed this* court, that *where any principle of law, establishing a rule of real property, has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals.* This is a principle so obviously just, and so indispensably necessary under our system of government, that it can not be lost sight of. The inquiry then is, *whether the question arising in this case has been so settled in the State courts of New York as to be considered at rest there.* 162.

* * * It has been urged, however, at the bar, that this court applies this principle *only* to State constructions of their own *statutes.* * * * But the same rule has been extended to other cases; and there can be no good reason why it should not be, *where it is applying settled rules of real property.* This court adopts the State *decisions*, because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the *common* law as the *statute* law of the State *when applied to the title of lands, and such a course is indispensable, in order to preserve uniformity;* otherwise, the peculiar constitution of the judicial tribunals of the States and of the United States would be productive of the greatest mischief and confusion. 167.

United States v. Fox, 94 U. S., 315:

The sole question for our consideration in this case is the validity of a *devise* to the United States of *real estate* in the State of New York. *The question is to be determined by the laws of that State.* * * * The power of the State to regulate the *tenure of real property* within her limits, and the *modes of its acquisition and transfer*, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owners, is undoubted. It is an established principle of land, *everywhere* recognized, arising from the *necessity* of the case, that the disposition of immovable property, whether by deed, descent,

or any other mode, is exclusively subject to the government *within whose jurisdiction the property is situated.* McCormick v. Sullivant, 10 Wheat., 202. The power of the State in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the Federal government. The *title and modes of disposition of real property within the State*, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, *and would seriously embarrass the landed interest of the State.* 320–1.

Williamson v. Suydam, 6 Wall., 723, involved the construction of a State *statute*. So eminent a lawyer as Mr. David Dudley Field, appearing for the plaintiff in error, made this concession:

> Since this court has thus determined that *it will look only to the State courts* for the exposition of statutes *and documents affecting the title to land*, even though it may have previously adjudged that such exposition was erroneous, and however contrary to reason that exposition may be, the plaintiffs must *abstain from debating any of the questions so resolved.* 728.

McGown v. Scales, 9 Wall., 23, announced the rule in construing a *deed*. The court said:

> It is a principle too firmly established to admit of dispute at this day, that to the law of the State in which the land is situated must we look for the rules which govern its descent, *alienation* and *transfer*, and for the *effect* and *construction* of conveyances. 27.

Burgess v. Seligman, 107 U. S., 20, denying the application of the rule to the particular case, yet concedes its force in unambiguous terms:

Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by *the course of their decisions certain rules are established which become rules of property and action* in the State, and *have all the effect of law*, and which it would be wrong to disturb. This is especially true *with regard to the law of real estate* and the construction of State Constitutions and statutes. *Such established rules* are always regarded by the *Federal* courts, *no less than by the State* courts themselves, *as authoritative declarations of what the law is.* 33.

Boyce v. Tabb, 18 Wall, 546, refusing to follow a State decision, that contracts of the kind then under consideration could not be enforced, and referring to sec. 34 of the Judiciary Act of 1879, and the duty imposed by it on the Federal courts, declares:

The provisions of that section do not apply, nor was it intended that they should apply, to questions of a general nature not based on a local statute *or usage*, nor on any *rule of law affecting titles to land*, nor on any *principle which had become a settled rule of property.* 548.

Ober v. Gallagher, 93 U. S., 189, reflects our contention in two sentences, on page 207:

It is claimed, however, that the law of Arkansas is different, and *that the Supreme Court of that State has decided* that a lien to secure the payment of purchase money, expressly reserved by the vendor in his deed does not pass by an assignment of the debt. *If such was the settled rule of law in the State* when the notes which were under consideration in this case were assigned, *we should be compelled to recognize it as a rule of property there and be governed accordingly.* Suydam v. Williamson, 24 How., 434.

The case cited from 24 Howard discusses the doctrine of observance by the Federal courts of the rules of property established by the State courts, and, *inter alia*,

adopts the language used in the earlier case of Beauregard v. New Orleans, 18 How., 497. We avail of a part of the text thus adopted:

> The constitution of this court requires it to follow the laws of the several States whenever they properly apply; and the habit of the court has been to refer *to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title to lands.* Upon cases like the present, the relations of the courts of the United States to a State *is the same as that of her own tribunals.* They administer the laws of the State, and to fulfill that duty they must *find them as they exist in the habits of the people, and the exposition of their constituted authorities.* 434.

Bucher v. Cheshire Railroad Co., 125 U. S., 555, considers at length the operation of sec. 34 of the Judiciary act of 1789, Rev. Stats., §721, and in the course of the discussion it is said:

> It is also well settled that where a course of *decisions*, whether founded upon *statutes* or not, *have become rules of property as laid down by the highest courts of the State*, by which is meant those rules governing the *descent, transfer or sale* of property, *and the rules which affect the title and possession thereto, they are to be treated as laws of that State by the Federal courts.*
>
> The principle also applies to *the rules of evidence.* In *Ex Parte* Fisk, 113 U. S., 713, 720, the court said: "It has been often decided in this court that in *actions at law* in the courts of the United States the *rules of evidence and the law of evidence* generally of the State *prevail in those* courts." See also Wilcox v. Hunt, 13 Pet., 378; Ryan v. Bindley, 1 Wall., 56. * * *
>
> There is no common law of the United States, and yet the main body of the rights of the people of this country rest upon and are governed by principles derived from the common law of England, and established as the laws of the different States. Each State of the Union may have its *local usages, customs and*

common law. Wheaton v. Peters, 8 Pet., 591; Pennsylvania v. Wheeling Bridge Co., 13 How., 519.

When, therefore, in an ordinary trial in an action at law we speak of the common law, we refer to the law of the State as it has been adopted by statute *or recognized by the courts as the foundation of legal rights.* It is in regard to *decisions made by the State courts* in reference to *this* law, and defining what is the law of the State *as modified by the opinions of its own courts,* by the statutes of the State, and the *customs and habits* of the people, that the trouble arises. It may be said generally, that whenever the decisions of the State courts relate to some law of a local character, which may have become established by those courts, or has always been a part of the law of the State, that the *decisions* on the subject are *usually conclusive,* and always entitled to the highest respect of the Federal courts. The whole of this subject has recently been very ably reviewed in the case of Burgess v. Seligman, 107 U. S., 20. *Where such local law or custom has been established by repeated decisions of the highest courts of a State, it becomes also the law governing the courts of the United States sitting in that State.* 583–4.

Detroit v. Osborne, 135 U. S., 492, sustained the doctrine of the Michigan courts, that the failure of a municipal corporation to keep in repair a sidewalk, when the duty to do so was imposed on it by statute, did not confer upon one injured by neglect of the corporation to perform that duty a right of action to recover for the injury—although it was conceded that the doctrine was not in harmony with the general rule, nor with the decisions of the Supreme Court. The case is most significant. The defendant in error denied that a decision by the Supreme Court of Michigan—relied on by the plaintiff in error as conclusive—was binding on the Federal courts; because it was not and did not purport to be based on any statute or local law of the State, and was not a rule

of property, but merely held as matter of general law, and upon principles of general jurisprudence, that incorporated cities were not liable for injuries resulting from neglect to keep their streets in repair. 493. It conceded, however, that "*where decisions of State courts have become rules of property, they will be adopted as a part of the local law.*" 494.

The Supreme Court, reversing the judgment of the trial court, held that the settled law of Michigan, *as ruled by its own courts*, was that municipal corporations were not liable to such action as the plaintiff below had recovered on, and that that law concluded the Federal courts—referring to Bucher v. Railroad Co., 125 U. S., 584, *supra*, what has been said—to the point that Texas decisions protecting judgments of the cour s of the State from collateral impeachments by evidence *aliunde* the record, constitute a rule of property under which such judgments, when for the recovery of land, are effective muniments of title to such land—derives additional force from the fact that in that State the action to try title to and recover land is a proceeding *in rem;* for in such proceeding notice to the person, whether actual or constructive, is no element—certainly no necessary condition—of *jurisdiction.*

Hardy v. Beatty, 84 Texas, 562, involves consideration of the validity upon collateral attack, of a judgment rendered in 1856 in favor of one Outlaw against the heirs of one Wilson, divesting said heirs of and vesting said Outlaw with title to land—one of the defendants being

a minor and all of them nonresidents, and cited only by publication. The court found that no affidavit for citation by publication appeared in the record of the Outlaw suit; but following Texas cases cited *supra*, ruled that the judgment must nevertheless stand, in the absence of a denial *by the record* of the fact that an affidavit was made. It was contended by the appellant that the remedy pursued and the judgment obtained by Outlaw were *in personam* and not *in rem;* the court's answer was that the proceedings were *in rem*, and that the court had jurisdiction to render the judgment—*so far as it affected the title to the lands;* but not so in the particular of adjudging *costs* against the defendants, since *to that extent* the judgment was *in personam*, and did not support an execution.

Mr. Vanfleet, in his Collateral Attack on Judicial Proceedings, discusses the question of the necessity of notice in proceedings *in rem*, or *quasi in rem*, §§400–416. In support of his opinion that *jurisdiction* does not depend on such notice, observes, on page 397:

> At common law, the proceeding known as a "common recovery" was carried on without any notice whatever; but afterwards certain statutes were enacted requiring proclamations to be made in open court. The judgment was *in rem*, and bound the whole world, with certain exceptions, unless they put in their claim within a year and a day. With this law in force in New York, a statute was passed, in 1808, requiring notice of the pendency of the proceeding to be published; but *where this notice was omitted*, it was held to be merely an error which *did not make the proceeding void*. Roseboom v. Van Vechten, 5 Denio, 414, 418.

If it be true as held in Hardy v. Beatty, *supra*, that an action for land in Texas is a proceeding *in rem*, and that a judgment rendered in such action is conclusive when collaterally challenged — although the defendants are conceded to be nonresidents—unless the want of jurisdiction affirmatively appears on the judgment record, *a fortiori* should a judgment in such action be likewise conclusive when the defendant to the action is alleged by the pleadings to be a resident and citizen of the State and county of the jurisdiction, and is shown by the record to have appeared, pleaded, and contested the relief sought by the plaintiff and awarded by the court.

The title to land passes everywhere by the rules of the sovereignty of whose territory the land is a part, and not otherwise. These rules are to be found in the common law of the particular sovereignty, or in its statutes, or in the decisions of its courts, or in the customs and habits of its people. Once established, they are rules of property and inviolable, save by a change of policy or status in the agencies that created them. The United States have no common law, and their courts have no guide in determining controversies involving title to land save the rules of the particular State within whose territory and jurisdiction the land lies. Necessarily so. For, if not, the titles to land must depend on the accident of the character of the court—whether State or Federal—

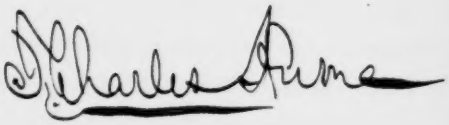
by which the question of such title has been determined.

The reflection is startling. Take the present case. By conveyance of Peter McGreal, the land in controversy vested, in 1848, in Stewart Newell, under whom the defendants in error claim title. McGreal reacquired the title, by judgment of the State court, in 1850, in a suit brought by him against Newell to recover the land, and the title so reacquired vested, by McGreal's conveyance of March 2, 1860, in Westrope, and thereafter passed from him to the plaintiffs in error. According to the law and long established rule of property of the State, the proceedings and judgment of 1850 vested McGreal with title to the land *impregnable to any collateral attack whatsoever*. Had the present action been brought in a court of the *State* the proceedings and judgment of 1850 would have been a conclusive bar to plaintiff's recovery. Hundreds of thousands of acres of land in the State are held by like proceedings and judgments, and the titles thereto so acquired are absolutely proof against collateral impugnment in the courts of the State.

Forty-six years, however, after the judgment of 1850 was rendered, and thirty-six years after Westrope acquired McGreal's title thereto, a Federal court of a district in the State, comprising the counties wherein the land vested in McGreal by that judgment lies, and wherein the judgment was rendered, permits those claiming under Newell to recover of those holding under McGreal, the identical land, in and by a collateral assault

on that judgment—declaring that *void* which in the courts of Texas is *absolutely impervious* to such assault. So, the Federal court sitting in Texas for the purpose—and with the sole power, in so far as it exercises jurisdiction of controversies involving title to land—of *administering* the law and established rules of property of that State, *overthrows* them, in a collateral proceeding, upon evidence *aliunde* the record of the State court and in *flat contradiction of its allegations, recitals and findings.*

If this judicial action is to be affirmed here, then, it is plain, that the elementary and universal rule, that title to land passes not otherwise than by the law of the State of whose territory the land is a part, no longer exists.



Counsel for Plaintiffs in Error.